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Supreme Court of the United States

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES,

Petitioners,

v.

RONALD HANSEN, individually and in his official capacity as Police Chief,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a discrimination investigation that requires all and only the African American police officer to participate warrants strict scrutiny in order to determine whether rights under the Equal Protection Clause have been violated.

Whether Black officers were similarly situated with White officers in the context of a violation under the Equal Protection Clause by being required to participate in an all and only Black investigation without a strict scrutiny analysis.

Whether it was clearly established in February 1996 that a mandatory discrimination investigation limited to only African Americans was an impermissible race based classification in violation of the Equal Protection Clause.

CORPORATE DISCLOSURE

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

PARTIES TO THE PROCEEDING

The Petitioners are Gregory Williams and Virgil Reaves. They are the plaintiffs in the District Court and the Appellees in the Court of Appeals.

The Respondent is Ronald Hansen, former Chief of Police of the City of Fayetteville, North Carolina. He was a defendant, sued in his individual and official capacity, in the District Court and the Appellant in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE ii

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 3

A. Plaintiff Gregory Williams 3

B. Plaintiff Virgil Reaves 5

II. PROCEEDING BELOW 7

A. United States District Court for the Eastern District of North Carolina 7

B. United States Court of Appeals for the Fourth Circuit 8

REASONS FOR GRANTING THE PETITION 9

I. Strict Scrutiny is the Applicable Standard for All Race-Based Government Classifications, Regardless of the Government Actor's reasoning 10

II. Defendant Hansen was not entitled to qualified immunity as the motives behind the institution of the race-based investigation should have been evaluated under the Equal Protection principles established under Arlington Heights 16

A. The Petitioners have alleged the violation of a clearly established right under the Equal Protection Clause 17

B. Plaintiffs' rights under the Equal Protection Clause to be free from a mandatory race-based investigation were clearly established at the time of the deprivation 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200, 132 L. Ed. 2d 158,
115 S. Ct. 2097 (1995)....passim

Anderson v. Creighton,
483 U.S. 635, 97 L. Ed. 2d 523,
107 S. Ct. 3034 (1987)....9

Arlington Heights .v. Metro. Hous. Dev. Corp.,
429 U.S. 252, 50 L. Ed. 2d 450,
97 S. Ct. 554 (1977)....passim

Behrens v. Pelletetier,
516 U.S. 299, 133 L. Ed 2d 773,
116 S. Ct. 834 (1996)....3, 24

Elder v. Holloway,
510 U.S. 510, 127 L. Ed. 2d 344,
114 S. Ct. 1019 (1994)....28

Fullilove v. Klutznick,
448 U.S. 448, 65 L. Ed. 2d 902,
100 S. Ct. 2758 (1980)....14

Gomillion v. Lightfoot,
364 U.S. 339, 5 L. Ed. 2d 110,
81 S. Ct. 125 (1960) 26

Gratz v. Bollinger,
156 L. Ed. 2d 257, 123 S. Ct. 2411,
2003 U.S. LEXIS 4801,
71 U.S.L.W. 4480 (U.S. 2003)....13

Grutter v. Bollinger,
156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003) 13

Hirabayashi v. United States,
320 U.S. 81, 87 L. Ed. 1774,
63 S. Ct. 1375 (1943) 15

Hope v. Pelzer,
536 U.S. 730, 153 L. Ed. 2d 666,
122 S. Ct. 2508 (2002) 28

Hunter v. Underwood,
471 U.S. 222, 85 L. Ed. 2d 222,
105 S. Ct. 1916 (1985) 13

Johnson v. Jones,
132 L. Ed. 2d 238,
115 S. Ct. 2151 (1995) 24, 25

McLaughlin v. Florida,
379 U.S. 184, 13 L. Ed. 2d 222,
85 S. Ct. 283 (1964) 14

Miller v. Leathers,
913 F.2d 1085 (4th Cir. 1990) 23

Northeastern Fla. Chapter of the
Associated Gen. Contractors of Am. v. Jacksonville,
508 U.S. 656, 124 L. Ed. 2d 586,
113 S. Ct. 2297 (1993) 16

Plyler v. Doe,
457 U.S. 202, 72 L. Ed. 2d 786,
102 S. Ct. 2382 (1982) 3

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265, 57 L. Ed. 2d 750,
98 S. Ct. 2733 (1978) 13, 25

Richmond v. J. A. Croson Co.,
488 U.S. 469, 102 L. Ed. 2d 854,
109 S. Ct. 706 (1989) 14, 27

Rogers v. Lodge,
458 U.S. 613, 73 L. Ed. 2d 1012,
102 S. Ct. 3272 (1982) 13

Saucier v. Katz,
533 U.S. 194, 150 L. Ed. 2d 272,
121 S. Ct. 2151 (2001) 17

Shaw v. Reno,
509 U.S. 630, 125 L. Ed. 2d 511,
113 S. Ct. 2816 (1993) 13, 25

Washington v. Davis,
426 U.S. 229, 48 L. Ed. 2d 597,
96 S. Ct. 2040 (1976) 18, 25, 26

Winfield v. Bass,
106 F.3d 525 (4th Cir. 1997) 23, 25

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267, 90 L. Ed. 2d 260,
106 S. Ct. 1842 (1986) 12, 14

Yick Wo v. Hopkins,
118 U.S. 356, 30 L. Ed. 220,
6 S. Ct. 1064 (1886) 17

Constitutional Provisions

U.S. CONST. AMEND. XIV 1, 14

U.S. CONST. AMEND. I 7

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

42 U.S.C. § 2000 7

42 U.S.C. § 2000 et seq. 7

42 U.S.C. § 1983 7

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Gregory Williams and Virgil Reaves, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The Order denying Rehearing En Banc is reported at App. at 164. The opinion of the Court of Appeals for the Fourth Circuit (App. at 1) is published at 326 F.3d 569(4th Cir. N.C. 2003). The decision of the District Court is located at App at 43.

JURISDICTION

The final judgment of the United States of Appeals for the Fourth Circuit affirming in part, reversing in part, the decision of the District Court of the Eastern District of North Carolina was entered on April 22, 2003 (App., infra, 1). The Order of that Court denying Petitioners' request for rehearing and suggestion for rehearing en banc was entered on June 13, 2003. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c). The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After allegedly hearing rumors that some African American police officers had met at a church to discuss issues about discrimination in the work place, former Chief Ronald Hansen ordered all 68 African American police officers to submit to mandatory interviews with the two senior African American police officers in order to determine whether they perceived discrimination existed in the department. App. at 51. Only African American police officers were required to submit to these interviews. For those African American police officers who perceived discrimination existed, the investigation continued as they were required to prove the validity of their perceptions. App. at 54.

In applying a strict scrutiny analysis, the District Court ruled that Defendant Hansen "undertook a formal investigation of racial discrimination... and in electing to interview only the Black Officers in the department, effectuated a racial classification that immediately and ultimately subjected" the Petitioners to unequal treatment. App. at 54. In reversing the District Court, the Fourth Circuit determined that a strict scrutiny analysis was not applicable because Black and White officers within the Department were not similarly situated as only the Black officers were allegedly subjected to discrimination. App. at13. Thus, the Court reasoned that Defendant Hansen could treat the Black officers differently in directing the all-Black interviews and not violate the Equal Protection Clause. App. at 19.

A heightened level of review -- strict scrutiny -- applies when there exist discrimination on the basis of a person's membership in a suspect class or when it burdens a group's exercise of a fundamental right. Plyler v. Doe, 457 U.S. 202, 216-17, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982); The Fourth Circuit departed from this longstanding principle by claiming the interviews were not based on race, but potential victims of discrimination.

The Petitioner raised as a material issue of fact whether Defendant Hansen's true motives in conducting the all-Black interviews was to identify the names of African American police officers who felt discrimination existed in order to determine which of these officers might have met at the church and consequently might be an obstacle to the department's efforts to terminate a Court ordered Consent decree. The Fourth Circuit decided that it could rule on the "abstract question of law" as to when such an investigation is proper without there first being a factual determination about what Defendant Hansen's motives were. App. at 10. This de novo review by the Fourth Circuit of the District Court's factual findings concerning Defendant Hansen's motive in conducting the all-Black interviews was an extraordinary departure from the limited appellate jurisdiction the Court should have exercised in this case. Behrens v. Pelletetier, 516 U.S. 299, 31-13, 133 L. Ed 2d 773, 116 S.Ct. 834 (1996).

I. FACTUAL BACKGROUND

A. Plaintiff Gregory Williams

Plaintiff Gregory Williams was one of several African-American police officers who had concerns that the Fayetteville City Police Department had not only

deliberately failed to comply with the 1974 consent decree[1], but also was taking deliberate steps to impede the progress of African-American police officers. App. at 52.

A number of African-American police officers formed a group called "Officers for Equality." (JA 370). The purpose of this group was to develop means to increase the number of qualified African American officers hired and promoted within the Department. (JA 166). They were also interested in opposing acts of discrimination against Black officers. (JA 170 & 184-186). One of their major concerns was Defendant Hansen's tactics of pressuring African-American officers, over their objections and with threat of termination, to prepare false written statements attesting to the Department's efforts to comply with the consent order, and asserting that the order was no longer necessary. App. at 37.

On Saturday, February 24, 1996, Defendant Hansen allegedly learned that this group had met at a local church. On the following Monday, February 26, 1996, he asked the two senior African-American police officers, Major George Moyd and Captain Robert Shambley, to meet with each African American officer in private sessions to extract from them their individual perceptions as to whether they perceived the existence of discrimination within the Department and/or whether they believed that discrimination existed within the Department. App. at 51. Defendant Hansen felt that Black officers might be "unwilling" to speak with White officers about

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[1]In 1974, the City of Fayetteville entered into a Consent Decree in which the City made a commitment to hire, train and promote African American police officers. The Consent Decree called for the City to maintain and report annual progress which they failed to do. See foot note 4 in the District Court's Order for more details.(App. at 52-53).

discrimination and he "apologized" to Shambley and Moyd for having to do this (JA 94).

Many African-American police officers feared that these interviews were a "witch-hunt" to identify the leaders of this group because it appeared from their past experiences to be a trap.. (JA 371). Lt. Bryant admitted that OPS attempted to find out who had attended the meetings at the Church, but that OPS could not produce sufficient evidence to confirm its membership (JA 78).

Of the sixty-eight African-American police officers who were required to meet with either Captain Shambley or Major Moyd (JA 371), the interviews yielded seventeen officers who admitted that they perceived discrimination existed. (JA 372). White officers were not interviewed by Major Moyd and Captain Shambley. App. at 5.

Defendant Hansen then distributed the officers' comments to his senior staff with instructions for them to initiate an investigation into the "allegations" made by each of these officers. In his cover memo to the senior staff, Defendant Hansen instructed his supervisors that they could simultaneously look for ways to "discredit" the officers' concerns. App. at 57. No complaints had been filed by any police officers prior to this investigation.

B. Plaintiff Virgil Reaves

On February 26, 1996, Captain Shambley interviewed Plaintiff Reaves about whether he perceived discrimination existed within the Fayetteville City Police Department. Plaintiff Reaves discussed his perceptions about discrimination under the belief that it would be confidential. App. at 53.

One day later, after the Shambley interrogation, on February 27, 1996, Plaintiff Reaves was ordered to report to OPS to meet with Lt. Richard Bryant.. At the start of this meeting, Plaintiff Reaves made it very clear that he did not want to voluntarily reveal his opinions and perceptions about discrimination within the workplace that he had stated the day before to Shambley in confidence. He stated:

> Well, I'll say this for the record, when I talked to Captain Shambley yesterday I thought it was something of concern, I didn't know it was something that I'd be having to sit down in front of a tape recorder at OPS over. And the question was asked "do I know of or do I feel that I have ever been discriminated against at the Department" and in some way I feel that I have, but to go into detail with discussing them again, I don't want to. App. at 54.

Lt. Bryant then informed Plaintiff Reaves that "it's not an option at this time." App. at 54. When Plaintiff Reaves expressed reservations about responding to certain questions about discrimination in the workplace, he was repeatedly warned that he had no option but to respond and in one instance Lt. Bryant informed Plaintiff Reaves that he was "skating on thin ice" when he declined to provide names of other African American police officers who felt discrimination existed in the workplace. App. at 55.

Lt. Bryant then read Plaintiff Reaves the Garrity warnings and ordered him to reveal what he had told Captain Shambley the day before. (JA 427). Plaintiff Reaves then complied with the directive and restated what he had shared in confidence with Captain Shambley. (JA 428).

A day later, on February 28, 1996, Plaintiff Reaves was called before Defendant Hansen and informed that his comments were now complaints and that if he did not prove his allegations, he would be disciplined. App. at 56.

Both Plaintiffs were subsequently terminated based on statements they made that discrimination existed. Each alleged false statement they were charged with making were stated during the interviews with Shambley/Moyd and/or during the subsequent OPS investigations.

II. PROCEEDING BELOW

A. United States District Court for the Eastern District of North Carolina

The Plaintiffs, Gregory A. Williams and Virgil H. Reaves, filed these consolidated civil rights actions against the City of Fayetteville, the Fayetteville City Council, and various City employees in their official and individual capacities for violations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq., as amended by the Civil Rights Act of 1991, and the Civil Rights Act of 1871, 42 U.S.C. §1983 for retaliation, retaliatory harassment, retaliatory discharge, and a violation of their rights under the First Amendment. The Plaintiffs also pursued Equal Protection and due process claims under 42 U.S. §1983 and a claim for intentional infliction of emotional distress pursuant to North Carolina law against each defendant.

On May 13, 2002, the trial court entered an Order which denied the defendants' summary judgment motion as to the Plaintiffs claims for retaliation, retaliatory discharge, and retaliatory harassment under 42 U.S.C. §2000 as well as the 42 U.S.C.§1983 First Amendment claim against the City of Fayetteville. The trial court also denied Defendant Ronald Hansen qualified immunity on each of the Plaintiffs' Equal Protection claims. The remaining individual

defendants were granted qualified immunity and dismissed from the lawsuit (JA 422). On May 15, 2002, Defendant Hansen filed his interlocutory appeal to the United States Court of Appeals for the Fourth Circuit on the denial of qualified immunity regarding the equal protection claim.

B. United States Court of Appeals for the Fourth Circuit.

On April 22, 2003, the Fourth Circuit, in a 2-1 decision, reversed the Order of the District Court. The court, in a majority opinion authored by Senior Circuit Judge Morton I. Greenberg, held that the mandatory all Black interviews were not a racial classification that warranted strict scrutiny despite the fact that only African Americans were the targets of the investigations. The Court further held that the Plaintiffs failed to establish an equal protection violation because Black and White officers were not similarly situated simply because Defendant Hansen had heard that Black officers had been complaining and not White officers. The Court then reasoned that even if strict scrutiny had been applicable, that Defendant Hansen would nonetheless be entitled to qualified immunity because the state of the law in February 1996 would not have placed a reasonable official in his position on notice that he was violating the equal protection rights of his Black officers.

The dissent, which was authored by Circuit Judge King, found that under the principles announced in Arlington Heights .v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65, 50 L. Ed. 2d 450, 97 S. Ct. 554 (1977), the Plaintiffs had alleged specific facts from which it could be inferred that when Hansen selected all and only the African American officers for his investigation, he was motivated at least in party by a discriminatory animus. Judge King reminded the majority that under the "clearly established" prong of the qualified immunity inquiry as announced in

Anderson v. Creighton, 483 U.S. 635, 639, 97 L. Ed 2d 523, 107 S. Ct. 3034 (1987), Defendant Hansen "had fair notice that a facially neutral yet discriminatorily motivated administrative action violates equal protection." App. at 41.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because of the Fourth Circuit's significant departure in the manner in which the racial classification was construed by this Court in the context of the Equal Protection Clause. The Fourth Circuit determined that the mandatory all Black interviews were not a racial classification that warranted strict scrutiny despite the fact that: 1) only African Americans were the targets of the investigations, 2) Hansen recruited the two senior African American police officers to speak to only these African American police officers and, 3) these investigations were initiated after Defendant Hansen heard rumors about Black officers meeting to discuss discrimination in the department..

Certiorari should also be granted to address the determination by the Fourth Circuit that Black and White officers were not similarly situated simply because Defendant Hansen had learned through rumors that some Black officers had been complaining about discrimination, but not White officers. This case represents a landmark departure from the evidentiary standards of proof that a plaintiff has been required to show in order to prove the existence of invidious discrimination under the Equal Protection Clause. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 264-65.

Certiorari should also be granted by this Court to address the apparent radical departure by the Fourth Circuit from the precedent that established limits on the appellate jurisdiction involving interlocutory appeals. The

precedence set by the Fourth Circuit is the law of this case that sanctions the utilization of all-Black investigation in a variety of ways. Certiorari should be granted in order to clarify what the parameters should be for determining a racial classification and to establish the parameters for what "similarly situated" should encompass in the context of racial classifications under the Equal Protection Clause.

The District Court found that the Plaintiffs had established sufficient evidence to show that the mandatory all-Black investigation was instituted with an illegal motive. In reversing the District Court, the Fourth Circuit determined that not only did a discriminatory motive not exist, but that Defendant Hansen had acted reasonably. The findings made by the Fourth Circuit that the investigation was reasonable not only contradicted the factual findings made by the District Court, but the Fourth Circuit disregarded all of the evidence the Plaintiffs forecasted during summary judgment.

Finally, the Fourth Circuit determined in the alternative that in addition to the Plaintiffs failing to establish an equal protection violation; a reasonable official in Defendant Hansen's position would not have known that conducting a race based investigation of his employees was unconstitutional. App. at 26. The Petition for Writ should also be granted to resolve the conflicts between the application of qualified immunity in this case with previous holdings by this Court as to when an official has "fair notice."

I. Strict Scrutiny is the Applicable Standard for All Race-Based Government Classifications, Regardless of the Government Actor's reasoning.

The Defendant Hansen argued below that strict scrutiny should not have been applied in this instance by the District Court because Defendant Hansen sought to

apply the most focused approach to the problem. The Fourth Circuit agreed and held that a strict scrutiny analysis was not applicable since the Black officers were allegedly subjected to these investigations not because of their race, Black, but instead because they were potential victims of discrimination. App. at 13.

There is no dispute in the record that Defendant Hansen treated the African American police officers differently than he did their White counterparts. But the Fourth Circuit determined that this was not a racial classification because "rumors" about discrimination were allegedly associated only with the Black officers and not the White officers.

The Fourth Circuit therefore reasoned that the all-Black investigation process did not violate the Equal Protection Clause because Black and White officers were not similarly situated since only the Black officers were the potential victims of discrimination and that Defendant Hansen was free to treat the two groups differently.[2] App. at 15.

The fact that the Defendant categorized the interviews as an attempt to interview "potential victims" is of little consequence to the eventual and ultimate result, only African American officers were subjected to these investigations. Ironically, the African American officers actually became the "potential victims" of discrimination

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[2]This assumption by the Fourth Circuit carries with it a racial stereotype that White police officers would not be qualified and/or are not capable of sharing views about their perceptions as to whether African American police officers are experiencing discrimination in the workplace. Whatever weight management might elect to give to these opinions, the total exclusion of this evidence is preposterous.

solely because of this investigation commenced. Furthermore, it is quite clear that the blunt impact of these investigations fell squarely on the shoulders of the African American police officers. Race-based distinctions are inherently suspect and are therefore subject to the most searching examination. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986).

The Fourth Circuit avoided a strict scrutiny analysis by focusing on whether this investigatory process by Defendant Hansen had an adverse impact upon any suspected classification of employees. The Court believed that there was no "express(ed) racial classification because Hansen selected not all and only the African-Americans, but rather all and only the alleged victims of intradepartmental discrimination. That those alleged victims were all African American officers did not, on this reasoning, render the classification expressly discriminatory." App. at 28.

The Fourth Circuit agreed with Defendant Hansen's contention that this case did not implicate the equal protection principles set forth in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) and as such Defendant Hansen's decision to interview only black officers should not be reviewed on a strict scrutiny basis because the interviews "were not race classifying guidelines, procedures or laws, but rather the most focused initial step taken by [him] to attempt to identify potential areas of perceived or real discrimination in the Department." App. at 15.

The Fourth Circuit made this finding notwithstanding the existence of undisputed evidence at summary judgment that Defendant Hansen ordered his two senior African American officers to interview only, and all African American officers after he heard rumors that some

African American officers had met at a church to discuss discrimination in the department. Despite further undisputed evidence that Defendant Hansen asked only his two senior African American officers to speak with the African American police officers because he knew these officers would be reluctant to speak about racial discrimination with White officers, the Fourth Circuit still determined that this was not a racial classification warranting strict scrutiny.

The Fourth Circuit departed from this Court's repeated and unequivocal command that "all racial classifications imposed by the government 'must be analyzed by a reviewing court under strict scrutiny.' " Grutter v. Bollinger, 156 L. Ed. 2d 304, 123 S. Ct. 2325, 2337 (2003) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. at 227), even if this classification of "potential victims" was motivated for the purpose Defendant Hansen claimed, i.e., to identify possible victims of discrimination, all racial classifications, "benign" or otherwise require strict scrutiny because "it may not always be clear that a so-called preference is in fact benign," Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), (opinion of Powell, J.).

Judge King's dissent pointed to clearly established precedent from this Court holding that the protection against invidious discrimination that hides behind facially neutral policies has become only more firmly entrenched. Shaw v. Reno, 509 U.S. 630, 644, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993); Hunter v. Underwood, 471 U.S. 222, 233, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985); Rogers v. Lodge, 458 U.S. 613, 618, 73 L. Ed. 2d 1012, 102 S. Ct. 3272 (1982). Most recently in Gratz v. Bollinger, 156 L. Ed. 2d 257, 123 S. Ct. 2411, 2003 U.S. LEXIS 4801, 71 U.S.L.W. 4480 (U.S. 2003).

The Fourth Circuit drastically departed from the race-based equal protection jurisprudence of this Court which does not permit an exception to the strict scrutiny rule. " 'Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Adarand, 515 U.S. at 226 (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion) '[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate . . . racial classifications are simply too pernicious to permit any but the most exacting connection between justification and classification.' " Id. at 236 (quoting Fullilove v. Klutznick, 448 U.S. 448, 533-35, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (dissenting opinion)).

Deferring to the alleged "common-sense" of state officials on matters of race is fundamentally at odds with the requirements and purpose of the Fourteenth Amendment. *See* Adarand, 515 U.S. at 228. This departure by the Fourth Circuit from the race-based equal protection jurisprudence is of such national significance as this case now establishes precedent that can serve as the foundation for a multitude of arbitrary state actions which might be motivated by discrimination, but shielded from the appropriate level of judicial scrutiny. "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" Wygant v. Jackson Bd. of Ed., 476 U.S. at 273 (plurality opinion of Powell, J.); Fullilove, 448 U.S. at 491 (opinion of Burger, C. J.); see also id., at 523 (Stewart, J., dissenting) ("Any official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); McLaughlin v. Florida, 379 U.S. 184, 192, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964) ("Racial

classifications [are] 'constitutionally suspect'"); Hirabayashi v. United States, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943). ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people").

These mandatory investigations were employed solely to identify the names of those African American police officers who perceived discrimination existed Once their perceptions about discrimination were revealed, they were then burdened with having to prove the validity of their perceptions. Responding to the evidence of motive forecasted by the Plaintiff, the District Court found that:

> The investigations were taken to put the Plaintiffs in the untenable position of proving their perceptions while placing the Department in the position to terminate their employment when and if their statements about discrimination and retaliation did not turn out to be true. App. at 114.

Despite the District Court's factual finding, the Fourth Circuit determined that this "discriminatory investigation was legitimate and "reasonable."(App. at 19). If an employer can create a racial classification that is disguised as a discrimination investigation that is nothing more than a dragnet used to screen out those employees of one particular race who hold perceptions that the employer dislikes, the impact of this decision will have a chilling effect upon the victims being able to challenge unlawful discrimination.

The discrimination investigations ordered by the Defendant Hansen expressly classified Fayetteville City Police Officers on the basis of race by requiring only Black officers to participate and to prove their perceptions that the

existence of discrimination was true. The requirement by Defendant Hansen in effect treated his officers " unequally because of his or her race," Adarand, 515 U.S. at 229-30, which resulted in the Black officers being placed "on an unequal footing because of their race" which by all accounts is a violation of the Equal Protection Clause. Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993).

The classification of the African American police officers as "potential victims did not negate the fact that a racial classification was created. The courts have conclusively held that when such an impermissible classification occurs, a strict scrutiny analysis is required in order for the Government to prevail. Adarand, 515 U.S. at 227.

It is therefore, imperative that certiorari be granted in order for this Court to clarify that suspected classifications should be determined by the impact upon a group and not the generic label that might be utilized in each case. Defendant Hansen's racially-based investigation process must withstand strict scrutiny -- he should have been required to show that the classification was narrowly tailored to further a compelling governmental interest. Adarand 515 U.S. at 227.

II. Defendant Hansen was not entitled to qualified immunity as the motives behind the institution of the race-based investigation should have been evaluated under the Equal Protection principles established under Arlington Heights.

The sequential analysis of qualified immunity assertions requires two initial inquiries: (1) whether the Plaintiffs have alleged the deprivation of a constitutional right; and (2) whether that right was clearly established at

the time of the deprivation. See **Saucier v. Katz**, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If the answer to both inquiries is affirmative, then Defendant Hansen is not entitled to qualified immunity. Id.

A. The Petitioners have alleged the violation of a clearly established right under the Equal Protection Clause.

There are several ways for a plaintiff to make out a valid claim of unconstitutional discrimination. A plaintiff can point to a law or policy that expressly classifies persons on the basis of race. See Adarand Constructors, Inc. v. Pena, 515 U.S. at 213, 227-29. Or, a plaintiff can identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. See Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 30 L. Ed. 220, 6 S. Ct. 1064 (1886). A plaintiff can also allege that a facially neutral statute or policy that is neutrally applied nonetheless has an adverse effect on a protected group, and that the adoption of the statute or policy was motivated by discriminatory animus. See Arlington Heights, 429 U.S. at 264-65.

The Fourth Circuit departed from well established equal protection jurisprudence by its determination that the required all-Black investigation of African American police officers' perceptions of discrimination was not a violation of the Equal Protection Clause. The Court "was satisfied that a classification distinguishing between possible victims and other officers for purposes of the interviews could survive a strict scrutiny analysis as the classification was narrowly tailored and the police department had a compelling interest in knowing whether there was discrimination in the department. (App. at 19.). For reasons to be discussed below, the Plaintiffs contend that the actions by Defendant Hansen represented an expressed race classification that should have been reviewed under a strict scrutiny analysis. In the alternative, the Plaintiffs forecasted sufficient

evidence to establish an equal protection violation by demonstrating that the facially neutral discriminatory investigation instituted by Defendant Hansen had an adverse impact upon the Plaintiffs and that the evidence proved that the investigation was motivated by discriminatory animus.

The process announced by Arlington for determining a race based equal protection violation was significantly altered by the Fourth Circuit's failure to apply the strict scrutiny analysis to the race classification, but also by their refusal to consider the "totality" of Hansen's conduct. App. at 11. The Plaintiffs are required to prove that Defendant Hansen's investigation was motivated, at least in part, by a racially discriminatory purpose. Arlington Heights, 429 U.S. at 265. This determination has been described as "a sensitive inquiry." that requires examining "such circumstantial and direct evidence of intent as may be available." Id. at 266.

By refusing to consider the "totality of Hansen's conduct," the Fourth Circuit avoided examining the impact of these investigations on the African American officers. "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the (practice) bears more heavily on one race than another. Washington, 426 U.S. at 242. As the dissenting opinion adequately stated below: Hansen's purported policy of selecting for interviews only the alleged victims of intradepartmental discrimination bore not just more heavily on one race than another. By leading him to investigate all and only the African American officers, Hansen's policy bore exclusively on one race.

Contemporaneous with the decision by Defendant Hansen to conduct the investigation were three critical factors that were not considered by the panel majority on

the Fourth Circuit. First, not one African American police officer had complained to the Department about discrimination. Fearing retaliation, a few officers were secretly meeting at a church to discuss their concerns. Had the appropriate level of scrutiny been applied, the Defendants may not have been able to demonstrate a compelling reason for these investigations since it is hard to see how mandatory investigations of this nature can be justified from unsubstantiated "rumors.".

Secondly, the Fayetteville City Police Department had been under a judicial Consent Order to improve working conditions for African American officers for over 20 years and were making plans to terminate the order without compliance. App. at 52. The evidence offered by the Plaintiffs showed that the investigations were a preemptive strike to stifle any resistance by the officers to challenging the Department's efforts to terminate the Consent Decree. Finally, the record is totally devoid of any evidence that this investigation accomplished anything except to harass and intimidate the African American police officers. Under the Arlington Height's test for considering the total circumstance, how the investigation was subsequently conducted and the end results are very relevant to the overall inquiry. App. at 36-37.

To make it appear that Defendant Hansen's actions were legitimate, the Fourth Circuit stated that his decision was motivated and preceded by "renewed complaints" (App at 4) or "allegations" (App. at 10) of discrimination. However, it cannot be reiterated enough that the record is totally devoid of any evidence that even one officer complained or made allegations about discrimination. The repeated assertions that the motivation for conducting the investigation came from complaints and/or allegations of discrimination from African American officers is not supported in the record except for Defendant Hansen's

unsubstantiated assertions. Nevertheless, the Fourth Circuit stated that:

> Hansen was confronted with allegations that blacks were subject to discrimination and he reasonably caused the possible victims of the discrimination to be interviewed to ascertain their views as to whether the allegations were accurate.. (App. at 19.)

The Plaintiffs produced admissible evidence during summary judgment that Defendant Hansen's primary motivation in conducting the all-Black investigations was to uncover the names of officers who had met at the church. When Plaintiff Reaves declined to give names of African American officers who believed discrimination existed or names of White officers he believed discriminated against him, he was read the Garrity warnings and threatened with termination. As Plaintiff Reaves continued to demonstrate reluctance to give names, he was told he was "skating on ice" (App. at 55) and given a direct order to provide the names.

This "discriminatory investigation" as described by Defendant Hansen was seen as a witch hunt by the African American police officers and encompassed the full impact of an *employment lynching*. The Defendant does not even offer the pretext that African American police officers benefited from this investigation. To the contrary, this entire process poisoned the environment with racial tension and distrust. Defendant Hansen's department-wide distribution of the name and perceptions of every African American police officer not only stigmatized these officers, but created a lynch mob mentality that adversely altered the work environment of every African American officer in the department.

The memo which accompanied this list mandated that the supervisors were to "extract" the perceptions from their officers which represented a formal declaration for the supervisors to confront only the African American officers about their views on discrimination. (App. at 57). In effect, this was a "prove it or lose" your job confrontation in which Defendant Hansen pitted the entire department against the African American police officers who were required to first reveal their perceptions and then prove the validity of their perceptions or face discipline.

Notwithstanding the harassment and fear of being terminated, the humiliation of being categorized by their White peers as one of "Blacks playing the race card" was dehumanizing and totally unwarranted. Many African American officers, such as the Plaintiffs, for various reasons, elected not to challenge or complain about acts of discrimination that they encountered. For Defendant Hansen to essentially convert the department into the "thought police" and authorized the extractions of perceptions of discrimination of all and only the African American police officers was unconscionable. During the period of time in which this so called "discrimination investigation" was ongoing, incarcerated criminal suspects were afforded more constitutional protections than the African American police officers who served the City of Fayetteville.

The Fourth Circuit committed a grave injustice to not just the Plaintiffs, but to all the African American police officers who endured months of racial harassment and intimidation from supervisors as a result of this "discrimination investigation." By refusing to consider the circumstances in their "totality," the Fourth Circuit turned a blind eye to the multitude of acts of invidious discrimination that were part of this "discrimination investigation." For example, Plaintiff Reaves, under threat

officer was ordered to give the names of peers he perceived were racists. The Department informed these officers that Plaintiff Reaves had called them "racists." This tactic served no other purpose than to invoke racial hostility by White officers towards Plaintiff Reaves and should not have been ignored by the Fourth Circuit.

When Plaintiff Williams expressed concerns that discrimination might have had a role in his non-selection to a position as a homicide detective, he was summarily removed from his job as a narcotics detective and reassigned to a patrol officer. Captain Bradley Chandler required the remaining African American narcotics officers to sign a pledge of understanding that if they felt they got their job because of their race, to let him know and he would remove them. (App. at 63).

Defendant Hansen, OPS, and many of the senior officers took on the role of a crazed lynch mob that went about the business of identifying African American police officers who believed discrimination existed and then forced them to prove their perceptions on the spot or face discipline. While Defendant Hansen may have come forward with his own reasons for the investigations, the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." Arlington Heights, 429 U.S. at 265.

The evidence forecast by the Plaintiffs was sufficient to prove an invidious motive in connection with these investigation. The Fourth Circuit erred when it stopped the analysis at the point where Defendant Hansen articulated his reasons for the investigations of only the African American police officers. The Fourth Circuit acknowledged that the "existence of a factual dispute regarding Hansen's motives does not preclude us from entertaining this appeal

even though we cannot resolve disputes of fact." App. at 10-11.

The invidious animus of Defendant Hansen was clumsily veiled behind this purported discriminatory investigation which was analogous to a wolf in sheep clothing. The constitutional indifference demonstrated by the Fourth Circuit in failing to peek behind this purported veil of legitimacy was absolutely flawed.

The disputed facts as to Defendant Hansen's motives in selecting all and only the African-American officers as targets of his investigation cannot so easily be brushed aside. The Plaintiffs, as the non-movants, are entitled "to have the credibility of the evidence as forecast assumed, (their) version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to (them)." Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990). Indeed, as noted in the Amicus Curiae brief of the NAACP:

> The present matter is before this Court pursuant to Hansen's interlocutory appeal challenging the District Court's denial of qualified immunity on Reaves' and Williams' equal protection claims (Citations omitted). What is not properly before the Court, however, is any claim that Reaves and Williams have "not presented enough evidence to prove that [their] version of the events actually occurred . . . ." Winfield, 106 F.3d at 530.

Brief of Amicus NAACP at 5.

In assessing the purpose of the investigation, the District Court determined that "it seems clear from defendants' statement . . . that the Department was not

intent on investigating the perceptions of discrimination but rather intent on investigating what the defendants involved considered 'lies.'" The dissent from the Fourth Circuit added that the "tortuous machinations employed to transform descriptions of perceived discriminatory or retaliatory conduct into 'lies,'" id., lend further credence to the plaintiffs' contention that Hansen ordered the African-Americans-only interviews with discriminatory intent. App. at 38.

The stark contrast between the investigation described by the Fourth Circuit is quite different from the investigation the District Court described, based upon the evidence presented by the Plaintiffs at summary judgment. The fact that the Fourth Circuit used the word "reasonable" to describe the same investigation that the District Court referred to as "Defensive, Domineering and Hyper-technical scrutiny" is the clearest example of how far the Fourth Circuit departed from the District Court's findings of fact in order to make its ruling. (JA 487). In the record, the Plaintiffs referred to this investigation as a "lynching." The District Court also described the tactics by the department as an effort to "transform description of perceived discriminatory or retaliatory conduct into "lies" that were, at best, disingenuous and at worst, a particularly heinous form of retaliation in and of themselves (JA 442).

The Supreme Court has stated that appellate jurisdiction is confined to reviewing any "purely legal" determination on which it rests that the facts as alleged by the non-movant and assumed by the court "support a claim of a violation of clearly established law." Behrens v. Pelletier, 516 U.S. 299, 312-13, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996); Johnson v. Jones, 132 L. Ed. 2d 238, 115 S. Ct. 2151, 2156 (1995). Insofar as the order also rests on a "fact-related" determination that genuine issues of material fact respecting the qualified immunity defense preclude

summary judgment, that determination is not reviewable ... on interlocutory appeal. Johnson, 115 S. Ct. at 2153, 2156-58. Oddly enough, the decision in this case is a drastic departure from the Fourth Circuit 's accepted and usual course of judicial proceedings concerning findings of facts on review of an interlocutory appeal. Winfield v. Bass, 106 F.3d 525, 534 (4th Cir. 1997)(en banc).

The motives of the employer as to both how and why any such investigation is conducted are indispensable factors that cannot be summarily dismissed because "it may not always be clear that a so-called preference is in fact benign," Bakke, 438 U.S. at 298 (opinion of Powell, J.). If the State action involves "explicit racial classifications, if it is inexplicable on grounds other than race, or if it contains race-neutral classifications that serve as mere pretext for racial discrimination, then courts are bound to apply the strict scrutiny regime. The classification must be justified by a compelling state interest, and then be narrowly tailored to fit that interest in order to survive constitutional scrutiny. Shaw v. Reno, 509 U.S. 630, 125 L. Ed 2d 511, 113 S. Ct 2816 (1995).

The District Court found that Defendant Hansen undertook a formal investigation of racial discrimination within the police department and in electing to interview only the Black officers in the department, effectuated a racial classification that immediately and ultimately subjected Officers Reaves and Williams to unequal treatment. App. at 158. The Fourth Circuit adamantly reiterated that their decision was based solely on Defendant Hansen's requirement that only African American officers be investigated and not on the "totality" of Defendant Hansen's conduct. App. at 25. In viewing the facts of this case in such a vacuum, the Fourth Circuit not only failed to consider Defendant Hansen's motives, but also did not consider the fundamental principles of Washington v.

Davis, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) that an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the (practice) bears more heavily on one race than another." Id. .

By not considering the "totality" of the facts and circumstances of this case, the Fourth Circuit took the all-Black investigation out of the context in which the District Court had determined an invidious motive was involved. Context matters when reviewing race-based governmental action under the Equal Protection Clause. See Gomillion v. Lightfoot, 364 U.S. 339, 343-344, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts").

In rejecting the "totality of the relevant facts" (App. at 19), inquiry, the Fourth Circuit failed to consider that as a direct result of the all-Black investigation, only African American officers were subjected to the OPS scrutiny and thus, only African American officers were subjected to the resulting discipline. The prospect whether these results evolved by chance or were a calculated design that harbored an invidious discriminatory motive was not lost by Judge King who in his dissent noted that:

> Hansen's purported policy of selecting for interviews only the alleged victims of intradepartmental discrimination bore not just more heavily on one race than another. By leading him to investigate all and only the African-American officers, Hansen's policy

> bore *exclusively* on one race. Thus, under the first Arlington Heights criterion, Hansen's decision to adopt the policy that he did strongly evinces a discriminatory intent. App. at 35-36.

By failing to consider the "totality of the relevant facts" inquiry, the Fourth Circuit also did not consider other crucial Arlington Heights factors that were considered in Judge King's dissent such as (1) the historical background of the decision, which may take into account any history of discrimination by the decision making body or the jurisdiction it represents; (2) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and 3) contemporary statements by the decisionmaker. Arlington Heights, 429 U.S. at 266-68. These factors provide the road map that leads to a factual finding of an invidious animus.

The motive behind the object of Defendant Hansen's inquiry represented a compelling question of fact that should have precluded appellate review at this stage and been preserved for a resolution by a jury. "Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Adarand, 515 U.S. at 226 (quoting Croson, 488 U.S. at 493).

The Plaintiffs' evidence of Defendant Hansen's motive was that in order to obtain the names of the African American officers who met at the church, he used Shambley/Moyd as a screening process to identify which officers perceived discrimination existed. Lt. Bryant admitted that the OPS investigation was an attempt to identify the members of this group. (JA 78). Both Plaintiffs

were ultimately suspended and later fired for a number of charges which included their failure to provide names of other officers who felt discrimination existed. The zealousness of Defendant Hansen to learn the names of other officers that attended the church meeting exposed his invidious animus which was to identify and harass the members of this group.

B. Plaintiffs' rights under the Equal Protection Clause to be free from a mandatory race-based investigation were clearly established at the time of the deprivation.

Certiorari is needed in order for this Court to address the Fourth Circuit significant departure from the principles of Hope v. Pelzer, 536 U.S. 730, 741, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002), by requiring the Plaintiffs to "supply particularized case law to support their equal protection claims." App. at 23. This Court has held that "appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the District Court," Elder v. Holloway, 510 U.S. 510, 516, 127 L. Ed. 2d 344, 114 S. Ct. 1019 (1994).

To that end, this Court has stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." The "salient question" for a court of appeals is "whether the state of the law [at the time of the state action] gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional." Hope, 122 S. Ct. at 2513.

With these legal principles in mind, under any objective test, the record showed that no reasonable experienced official in Defendant Hansen's position could have failed to realize that he was violating the Plaintiffs' constitutional rights. As Judge King stated in his dissent,

Defendant Hansen "had fair notice that a facially neutral yet discriminatorily motivated administrative action violates equal protection. Indeed, given the unbroken and wide-ranging line of equal protection decisions reaffirming and applying the Arlington Heights' principles, it is difficult to imagine how the message might have been made clearer." App. at 41.

CONCLUSION

Certiorari is necessary in order for this Court to reaffirm the parameters of the Equal Protection Clause so as to prevent obvious racial classifications from escaping strict scrutiny. Furthermore, an unequivocal declaration from this Court that racial classifications such as the all Black investigations is needed to ensure that this type of invidious discrimination will not be repeated The practical meaning and effect that this Court has given to the legal principles of "strict scrutiny," "race classifications" and "fair notice" have been altered by the Fourth Circuit in a manner that threatens to erode the fundamentals of Equal Protection and qualified immunity.

This the 9th day of September 2003.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS
Appendix to Petition

Opinion of
The United States Court of Appeals
For the Fourth Circuit
entered April 22, 2003 ..... App. 1

Opinion of
The United States District Court
For the Eastern District of North Carolina,
Western Division
entered May 13, 2002..... App. 43

Order of
The United States Court of Appeals
For the Fourth Circuit
Re: Denying Petition for Rehearing
En Banc and Motion of Amicus Curiae
entered June 13, 2003..... App. 164

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1573

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES,

Plaintiffs-Appellees,

v.

RONALD E. HANSEN, individually and in his official capacity as Police Chief,

Defendant-Appellant,

and

THE CITY OF FAYETTEVILLE; ROGER STANCIL, individually and in his official capacity as City Manager; JOHN SMITH, individually and in his then official capacity as City Manager; RON ROBUN, individually and in his official capacity as City Manager; BRADLEY CHANDLER, individually and in his official capacity as a City Police Officer; RICHARD BRYANT, individually and in his official capacity as a City Police Officer; KATHERINE GUILETTE, individually and in her official capacity as a City Police Officer; STEVE MCINTOSH, individually and in his official capacity as a City Police

Officer; THE FAYETTEVILLE CITY COUNCIL; SHERRY SPARKS, individually and in her official capacity as a City Police Officer,

Defendants.

THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INCORPORATED; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Fayetteville, North Carolina Branch,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (CA-99-449-2-5BR, CA-99-450-5)

Argued: January 21, 2003

Decided: April 22, 2003

[Entered: April 22, 2003]

Before KING, Circuit Judge, HAMILTON, Senior Circuit Judge, and Morton I. GREENBERG, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

Reversed and remanded by published opinion. Senior Judge Greenbergwrote the opinion, in which Senior Judge Hamilton joined. JudgeKing wrote a dissenting opinion.

COUNSEL

ARGUED: Steven Craig Lawrence, ANDERSON, JOHNSON, LAWRENCE, BUTLER & BOCK, L.L.P., Fayetteville, North Carolina, for Appellant. James Harvestus Locus, Jr., Fayetteville, North Carolina, for Appellees. Joseph Michael McGuinness, THE MCGUINNESS LAW FIRM, Elizabethtown, North Carolina, for Amicus Curiae Police. **ON BRIEF:** William J. Johnson, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC., Washington, D.C., for Amicus Curiae Police. Dennis Courtland Hayes, Hannibal G. Williams II Kemerer, Baltimore, Maryland, for Amicus Curiae NAACP.

OPINION

GREENBERG, Senior Circuit Judge:

I. *INTRODUCTION*

This matter comes on before this court on defendant Ronald E. Hansen's appeal from an order entered in the district court on May 15, 2002, to the extent that the order denied Hansen's motion for summary judgment on the basis of qualified immunity on claims against him by plaintiffs Gregory A. Williams and Virgil Hugh Reaves under 42 U.S.C. § 1983. Plaintiffs predicated their section 1983 actions insofar as implicated on this appeal on Hansen's alleged violation of the Equal Protection Clause of the Fourteenth Amendment.[1] The

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[1] Plaintiffs also made other section 1983 claims as well as claims underTitle VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and state law that are not before us on this appeal.

district court decided this case in a comprehensive opinion setting forth the background of this case. *Williams v. Fayetteville*, 5:99-CV-449-BR(2) (E.D.N.C. May 13, 2002).

We describe the facts less expansively as the issues before us are narrower. Williams and Reaves are black men who served as police officers employed by the Fayetteville, North Carolina, police department during the time relevant to this appeal. It appears that there have been racial problems within the Fayetteville police department for in 1974 Fayetteville settled a discrimination action brought against it by agreeing to increase the opportunities of black officers for better training and assignments and for promotions. The parties to that litigation memorialized their settlement in a consent decree that still was in effect at the time of the events leading directly to this action. The decree, however, was terminated in 1997.

In February 1996, in response to renewed complaints of racial discrimination against blacks in the police department, Hansen, then the Fayetteville chief of police, directed two high ranking black police officers, Major George Moyd and Captain Robert Shambley, to interview all of Fayetteville's black police officers to determine whether any had experienced racial discrimination or whether they had information regarding discrimination against blacks. At that time, however, Hansen did not direct that Moyd or Shambley or anyone else question white officers as to whether they had information regarding discrimination against blacks. Hansen further directed that Lt. Richard Bryant, chief of the department's Office

of Professional Standards ("OPS"), was to interview any black officer who had perceived discrimination so that the complaints could be investigated.

In accordance with Hansen's direction, Moyd and Shambley interviewed all 68 black police officers in the department, Shambley interviewing Reaves and Moyd interviewing Williams. Both Reaves and Williams reported that there had been discrimination within the department and, in all, 17 officers did so. Williams and Reaves charge that the subsequent investigation of the reports of discrimination was nothing more than an effort to discredit the officers who had complained of discrimination and an attempt to determine the membership in a group of black officers called Officers for Equity that opposed racial discrimination in the police department[2]Hansen, not surprisingly, disagrees with these allegations but, as will be seen, this dispute of fact does not preclude us from deciding the legal issues posed on this appeal.

Even though this action involves other claims and defendants in addition to Hansen, on this appeal we deal only with plaintiffs' allegations that Hansen violated their rights to equal protection of the laws by causing Moyd and Shambley to interview only the 68 black officers and not the more numerous several hundred white officers. Hansen, in moving for summary judgment on the basis of qualified immunity,

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[2] We note that there is some discrepancy over nomenclature in this case as the parties and the district court variously characterize the interviews as inquiries or an investigation. Our outcome is not dependent on such differences as we are concerned with what happened rather than the parties' characterization of the events.

contended in the district court and contends here that his decision to require interviews of black officers with respect to racial discrimination was lawful and, in any event, did not violate clearly established constitutional rights of which a reasonable person would have known. Thus, in his view, he is entitled to summary judgment on the basis of qualified immunity on plaintiffs' section 1983 equal protection claims and the district court erred in denying him that relief.

The district court rejected Hansen's immunity defense for the following reasons. First, it cited and quoted *Shaw v. Reno*, 509 U.S. 630 (1993), to demonstrate the Supreme Court's disapproval of racial classifications, quoting the portion of the opinion holding that "state legislation that expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling governmental interest." *Id.* at 643. The district court then indicated that this principle has led courts "to conclude that intentional racial harassment of a public employee by a supervisor constitutes race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and is also actionable under [42 U.S.C] § 1983." Slip op. at 77.

The district court then stated that Hansen, when investigating racial discrimination within the police department, "in electing to interview only the black officers . . . effectuated a racial classification that immediately and ultimately subjected plaintiffs to unequal treatment." *Id.* The court indicated that it was not determinative that the case did not involve a statutory classification for in *Sylvia Development Co. v.*

Calvert County, 48 F.3d 810, 818 (4th Cir. 1995) (emphasis in original), we stated that the "Equal Protection Clause limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations." *Id.* The district court then said that inasmuch as "Hansen's investigation was explicitly limited to black officers, a suspect class, the court must apply strict scrutiny" in considering the investigation's legality. *Id.* Thus, the district court stated that "Hansen must show that the investigation was narrowly tailored to serve a compelling state interest," citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). *Id.* at 77-78.

The district court held that even assuming that the stated purpose for interviewing and investigating only the black officers, *i.e.*, to determine if there was racial discrimination in the department, was its actual purpose and was compelling:

> The court cannot conclude that the means chosen to effectuate the stated purpose were narrowly tailored. It was clearly overinclusive in that it subjected to investigation black officers who did not feel that discrimination or retaliation existed in the Department and underinclusive in that it did not take into account the perceptions of white officers regarding racial discrimination in the Department. There were certainly other, more narrowly tailored, non race-based methods that the Department could have employed to accomplish its stated purpose.

Id. at 78. The court, however, did not indicate what these alternative methods were.

Finally, after having concluded that Hansen's conduct violated the Equal Protection Clause, the court held that he was not entitled to qualified immunity for the following reasons:

> The court also concludes that plaintiffs' right to equal protection of the laws protecting them from being subjected to coercive state conduct solely on the basis of their race was clearly established in February 1996. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.") The court also concludes that a reasonable person in Chief Hansen's position would have known that his conduct would violate that right. Accordingly, the court concludes that defendant Ronald Hansen is not entitled to qualified immunity and thus is not entitled to summary judgment on plaintiffs' § 1983 claims that his conduct violated their right to the equal protection of the laws.

Id. at 78-79. Hansen then appealed.

II. *JURISDICTION AND STANDARD OF REVIEW*

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and we have jurisdiction under 28 U.S.C. § 1291 through application of the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We exercise *de novo* review on this appeal. *See Rogers v. Pendleton*, 249 F.3d 279, 285 (4th Cir. 2001); *Sylvia Dev. Co.*, 48 F.3d at 817.[3]

III. *DISCUSSION*

On this appeal Hansen contends that he is entitled to qualified immunity on plaintiffs' claims and thus the district court erred in denying his motion for summary judgment.[4] Initially in considering this contention we determine whether plaintiffs have alleged facts setting forth valid claims for a deprivation of a constitutional right. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001); *County of Sacramento v. Lewis*, 523 U.S.

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[3] Inasmuch as plaintiffs stated supplemental claims under state law the district court also exercised jurisdiction under 28 U.S.C. § 1367.

[4] Hansen also asserts that plaintiffs' complaints in a pleading sense did ot set forth claims for equal protection violations and that, in any event, plaintiffs do not have standing to pursue these claims. We find these arguments to be without merit, and reject them summarily without further ubstantive discussion. We do point out, however, that we have urisdiction to consider these arguments as the pleading issue is within our pendent appellate jurisdiction, *see Akers v. Caperton*, 998 F.2d 220, 223-24 (4th Cir. 1993), and we would be obliged to take notice if plaintiffs lacked standing as the absence of standing would be a jurisdictional defect. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

833, 841 n.5 (1998). Then, if plaintiffs' equal protection claims survive this threshold review, we must determine whether the right plaintiffs advance was clearly established at the time of its alleged violation so that a reasonable person would have known of the right. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this second inquiry the appropriate consideration is whether a reasonable officer could have believed that his conduct was lawful. *See Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Rogers v. Pendleton*, 249 F.3d at 288. If so then the officer enjoys immunity.

The operative facts here are quite clear. Hansen directed that Moyd and Shambley interview all of the black officers regarding their experiences or perceptions of racial discrimination within the department but did not direct that they or anyone else interview any white officers for information they might have relevant to the inquiry. While plaintiffs question the *bona fides* of Hansen's stated motives for pursuing the inquiry, *i.e.*, that he would not tolerate discrimination within the department and desired to take any necessary corrective measures, the interviews did reveal the position that the black officers articulated on the racial discrimination issue.

The existence of a factual dispute regarding Hansen's motives does not preclude us from entertaining this appeal even though we cannot resolve disputes of fact. What we can and will do is answer the abstract question of law as to whether when there are allegations that a discrete racial group has been subjected to discrimination, it is lawful to conduct interviews in the first instance only of members of that

group to ascertain their experiences and perceptions with respect to the discrimination. *See Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

We also emphasize that it is important to recognize that we do not deal with Hansen's alleged misuse of the information he obtained from the interviews any more than we resolve disputes regarding his motives in directing that Moyd and Shambley interview the black officers. Thus, while plaintiffs contend in their brief that "[t]aking the evidence in the best light for [them] Hansen used the Shambley/Moyd interviews and the subsequent Black-only investigations in order to determine the membership of the 'Officers for Equity,'" Appellees' Br. at 53-54, we agree with the district court to the extent that it held that plaintiffs' "claim that Chief Hansen violated their equal protection rights by further targeting those African-American officers who identified discriminatory practices within the Department . . . does not state a cognizable equal protection claim." Slip op. at 76.

Accordingly, even though plaintiffs in their brief complain that there was retaliation against them, in deciding this appeal we are not concerned with that contention. In this regard, we note that plaintiffs have brought complaints based on retaliation in violation of Title VII of the Civil Rights Act of 1964 against the City of Fayetteville and the Fayetteville City Council by reason of the ultimate termination of their employment and what they assert in their second amended complaints was the "creation of a hostile working environment based upon race and retaliation." App. at

319, 331. These charges still are pending in the district court.

As we have indicated, the district court applied strict scrutiny in considering the classification and found that the means to ascertain whether there was discrimination was overinclusive because "it subjected to investigation black officers who did not feel that discrimination or retaliation existed in the Department and underinclusive in that it did not take into account the perceptions of white officers . . . ." Slip op. at 78. That analysis was flawed and was internally inconsistent. Clearly, until such time as the black officers were questioned Hansen could not know which officers felt that there was a discrimination problem. Thus, to the extent that the classification he made included all the black officers it hardly could be overinclusive. Furthermore, unless Hansen had every white officer interviewed he could not know which ones, if any, shared that belief. But if he had had all the white officers interviewed then the classification under the district court's analysis would have been overinclusive.[5] In any event, we will not hold that a public official attempting to ascertain whether there is discrimination in his department may not initiate the process by seeking the views of members of the group which allegedly is the target of discrimination.

In reviewing Hansen's actions we recognize "that all racial classifications, imposed by whatever

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[5] We realize that there may be officers in other racial groups in Fayetteville, *i.e.*, Hispanic and Asian, but we do not find it necessary to mention them separately as the parties do not focus on them and their presence has no bearing on our analysis.

federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Hansen nevertheless argues that this case does not implicate the equal protection principles set forth in *Adarand* and, accordingly, his decision to interview only black officers should not be reviewed on a strict scrutiny basis "as the interviews were not race classifying guidelines, procedures or laws, but rather the most focused initial step taken by [him] to attempt to identify potential areas of perceived or real discrimination in the Department." Appellant's br. at 12-13. We agree with this argument. After all, we indicated in *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001), that "[t]o succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny."

In this case the black and white officers were not similarly situated with respect to the object of Hansen's inquiry as the former but not the latter were allegedly subject to discrimination. Thus, Hansen could treat the groups differently in directing that officers be interviewed without violating the Equal Protection Clause. Indeed, taking into account the applicable

principles that *Morrison* explained, it is evident that plaintiffs have conceded away their position on this appeal by stating in their brief that "[t]o prove a violation of the Equal Protection Clause, the forecasted evidence demonstrated that [they] were treated differently from similarly situated white officers." Appellees' br. at 43 (citing *In re Long Term Admin. Segregation of Inmates*, 174 F.3d 464, 471 (4th Cir. 1999)). The fact is that the black and white officers for the purposes of the matter into which Hansen was inquiring, *i.e.*, was there discrimination against black officers in his department, were not similarly situated. Thus, plaintiffs do not set forth valid claims for the deprivation of a constitutional right and their case fails at the outset.

We hasten to add, however, that our opinion should not be overread. Certainly, for most purposes officers in a police department must be regarded as similarly situated regardless of their race. Thus, in matters such as assignments, promotions, and salary levels a racebased distinction among officers would be subject to strict scrutiny in an equal protection analysis.[6] But it would be illogical to hold that officers in one racial group are similarly situated in an inquiry into whether there is discrimination against members of their racial group as compared to officers not within the group.

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[6] In fact, there is an assertion in this case that the department discriminates against black officers in assignments in that they are relegated to narcotics and patrol duties. We, of course, have no way of knowing whether this assertion is accurate but if it is it should be understood that we offer no opinion on the legality of the assignments and our opinion cannot be understood as validating them.

Even though plaintiffs' case has failed at its outset, we point out that Hansen made a completely reasonable classification that would survive a strict scrutiny analysis if it were applicable. He had information that some black officers believed that there was discrimination and he directed that the potential victims of the discrimination be interviewed to ascertain their knowledge of the situation. Surely, this approach was narrowly tailored to address the problem at hand. While the district court indicated that there "were certainly other, more narrowly tailored, non race-based methods that the Department could have employed to accomplish its stated purpose," slip op. at 78, it did not specify those methods.

Significantly, in their brief plaintiffs make a suggestion as to what they say "perhaps" would have been a more narrowly tailored approach to the interviews:

> One reasonable alternative to conducting the all Black investigations as [Hansen] did would have been for him to have compiled the same data that the City was then mandated to collect under the terms of the consent decree. The collection of this data would have provided him with the status regarding promotions, assignment and other pertinent data as to all the officers employed with the City and perhaps been a more narrowly tailored approach to the one taken by Appellant-Defendant Hansen.

Appellees' Br. at 48.

The problem with plaintiffs' approach is obvious. While Hansen undoubtedly could have made a statistical analysis of the race of officers promoted and of officers in particular assignments, that analysis would not have addressed the claimed acts of discrimination predicated on what plaintiffs charge was the hostile racial environment within the department. For example, Reaves complains of having "experienced great criticism from his supervisors and white co-workers" and having been suspended and reduced in rank. Appellees' Br. at 19. In his view, "the discipline and his treatment were discriminatory, [though] he elected not to appeal the suspension." *Id.* Reaves also complains that "white officers had told lies on him and discouraged trainees from working with him which contributed to his suspension in December 1995." *Id.* at 21. Moreover, "he felt that Black officers were not viewed as intelligent by white officers nor were Black officers given opportunities to make decisions as white officers." *Id.* At 21. The statistical analysis that plaintiffs propose could not reveal that an officer had perceptions of this kind.

Amicus curiae National Association of Police Organizations also makes suggestions as to how Hansen could have obtained the information he sought:

> 1) Conduct a traditional departmental survey of all officers in written form, with or without follow up interviews; and/or

2) Conduct structured interrogations of all officers; and/or

3) Conduct random interrogations of officers; and/or

4) Retain an independent law enforcement consultant experienced in addressing issues of suspect class discrimination.

Amicus Br. at 13-14.

Conceivably such methods would have uncovered information regarding discrimination. But obviously there are problems with the Association's suggestions. Written questions and answers may not be an accurate substitute for face to face questioning as they do not afford an opportunity for probing immediate follow-up questions. "Structured interrogations of all officers" would have been a far larger undertaking than simply questioning the potential victims of the discrimination and, in expanding the initial inquiries beyond the class of the alleged victims, would have imposed a larger administrative burden on the department. Random interrogations might have missed black officers subject to discrimination. Finally, employing an independent consultant would have passed to the consultant the choice as to how to proceed similar to that Hansen faced himself. We also point out that some of the Association's suggestions are less narrowly tailored than that Hansen adopted. In any event, we see no reason why the police department should not have

been able to investigate its own affairs and address its own problems, when, as here, it did so by making narrowly focused inquiries. Courts should not micro-manage police departments.

It is also important to recognize that Hansen did not preclude the questioning of white officers in a discrimination investigation. At a grievance hearing for Reaves, which is part of the record on this appeal, when asked why he did not have Moyd and Shambley speak to white officers, Hansen explained:

> It's the black officers were the ones that were talking about discrimination and racism now. That was an inquiry; not investigation. Once the inquiry is done, if the investigation point – wherever it pointed, then the Office of Professional Standards is charged with going after wherever it pointed.

App. at 94. Thus, Hansen regarded the interviews as merely making an opening inquiry.

In determining whether the classification that Hansen drew could have survived a strict scrutiny analysis, if applicable, it is useful to consider the stopping of motorists on a racial basis. Everyone would agree that police officers should not stop motorists merely on the basis of their race. But if police officers are advised that a perpetrator of a particular race is fleeing from the scene of a crime, surely it would be reasonable if they stopped only motorists of that race at a road block in an effort to apprehend the criminal.

Similarly, a police department lawfully might make a racial classification when picking officers to infiltrate a criminal enterprise depending on the racial make-up of the members of the enterprise.

Hansen was confronted with allegations that blacks were subject to discrimination and he reasonably caused the possible victims of the discrimination to be interviewed to ascertain their views as to whether the allegations were accurate. We are satisfied that a classification distinguishing between possible victims and other officers for purposes of the interviews could survive a strict scrutiny analysis as the classification was narrowly tailored and the police department had a compelling interest in knowing whether there was discrimination in the department. Therefore, even if plaintiffs' claims charged that officers who in fact were similarly situated were treated differently on the basis of their race, and they do not because the black and white officers were not similarly situated, the alleged disparate treatment would survive a strict scrutiny analysis. Thus, for this additional reason, plaintiffs' case does not survive the first prong of a *Saucier/Lewis* analysis. Accordingly, we are obliged to reverse the district court's order denying Hansen summary judgment.

As we indicated above, if we had determined that the facts the plaintiffs alleged set forth valid claims for a deprivation of a constitutional right, which we do not, we would have been obliged to determine whether the right involved was clearly established at the time involved so that a reasonable person would have

known of the right. But inasmuch as we have found that plaintiffs have not advanced valid claims we could stop this opinion at this point. Yet we will address the second aspect of a *Saucier/Lewis* analysis as our conclusion on it supplies an alternative basis for our decision.

The short answer to this inquiry is obvious. Certainly if judges of United States Courts of Appeals are of the view that plaintiffs are advancing a "right" that did not exist when allegedly infringed (and still does not exist) then the right could not have been clearly established at the time infringed. Indeed, it would be remarkable to hold that a reasonable person, here a chief of police, should have known more constitutional law than United States Circuit Judges and that because he did not he should be subject to the imposition of monetary damages.

That said, we nevertheless will consider cases dealing with racebased classifications in determining if the right plaintiffs advance was clearly established. We start quite naturally with *Anderson v. Creighton*, 483 U.S. 635 (1987), as the case instructs us on how to approach the inquiry. In that case the Court indicated that a government official performing a discretionary function, as was Hansen, was entitled to qualified immunity in a civil rights action "as long as [his] actions could reasonably have been thought consistent with the rights [he is] alleged to have violated." *Id.* at 638. Thus, the Court indicated, quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986), that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" The assessment of an

officer's actions turns on its "'objective legal reasonableness.'" *Id.* at 639 (quoting *Harlow*, 457 U.S. at 819).

Anderson then goes on to state the following:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right.
>
> Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases

> strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages.". . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 639-40 (omitting footnote and certain citations). *See also Cromer v. Brown*, 88 F.3d 1315, 1325 (4th Cir. 1996). This cautionary language in *Anderson* is particularly important in a case of this kind in which plaintiffs challenge an administrative race-based classification as such classifications in other contexts may be violative of the Equal Protection Clause.

In fact, however, plaintiffs do not refer to any case that should have led Hansen to conclude that a race-based classification in which in the first instance only the potential victims of discrimination were

questioned about their experiences and perceptions is unlawful. Significantly, Hansen threw down the gauntlet to plaintiffs on this point when he stated in his opening brief that he "has been unable to locate any appellate cases similar to the trial court's basis for denying him qualified immunity . . . ." Appellant's Br. at 23. He then quite reasonably argues that the absence of cases "is an indicator that his proactive decision to interview black officers can certainly not be said to have violated 'clearly established law' as of February 1996." *Id.*

In answering, plaintiffs do not supply particularized case law to support their equal protection claims. Instead, they make the nongermane argument that Hansen misused the interviews to ascertain the membership in Officers for Equity and then remind us that in *Podbersky v. Kirwan*, 38 F.3d 147, 152 (4th Cir. 1994), a case dealing with a race-based scholarship program, we indicated that "[g]overnment institutions that choose to employ racial classifications face 'a presumption that [such a] choice cannot be sustained.'" Appellees Br. at 55. We do not doubt that plaintiffs' citation of *Podbersky* is apt but that case merely indicated in a completely different context that there is a presumption that a race-based classification cannot be sustained. Here, however, that presumption never came into being as the black and white officers were not similarly situated. Moreover, if the presumption had been applicable then Hansen would have rebutted it even if his conduct was examined on a strict scrutiny basis.

Plaintiffs are supported on this appeal by a brief filed by amicus curiae National Association for the Advancement of Colored People ("NAACP") but it is of no help to plaintiffs as it, too, does not point to any case germane to this case in a "particularized" sense. *See Anderson*, 483 U.S. at 640. Rather, it tells us in a generalized way that strict scrutiny is required and charges that Hansen made a classification that was not narrowly tailored and was not reasonably related to a compelling state interest.

The NAACP complains that Hansen "asserted no legitimate rationale for urging *only* senior black officers to investigate *exclusively* African American police officers . . . regarding allegations of race discrimination in the Department." Br. at 15 (emphasis in original). This statement, however, simply is untrue. Hansen explained at Reaves' grievance hearing that "I felt that I did not want to have [a] perception during this inquiry that black officers would feel uncomfortable or unwilling to tell about racial discrimination if, in fact, it did exist. So that was my purpose of getting the two senior black officers." App. at 94. Furthermore, neither Moyd nor Shambley is a plaintiff in this action and the equal protection classification of which plaintiffs have standing to complain relates to the persons questioned and not the selection of the persons to ask the questions.

Similarly the Police Organization's brief does not cite any case germane to this appeal in a particularized sense demonstrating that the "right" plaintiffs advance was clearly established so that Hansen should have been aware of it. Indeed, its brief

makes clear that its argument challenges conduct beyond the circumstance that only black officers initially were questioned as its summary of its argument starts as follows:

> The District Court correctly denied qualified immunity to Defendant Hansen because of his intentional discriminatory practices including but not limited to racially based interrogations and retaliatory tactics against African American police officers in the Fayetteville Police Department. The totality of Defendant Hansen's conduct constitutes a form of internal racial profiling, segregating black officers for disparate treatment by interrogations and further investigations if they articulate perceptions of discrimination. This tragic case involves a web of overt discrimination and retaliation.

Br. at 6. The brief later argues that because cases are not completely alike, "the requirement of a clearly established right is not overly stringent." Br. at 11 (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 250-51 (4th Cir. 1995)).

This amicus curiae brief misses the point. We are not concerned on this appeal with the "totality" of Hansen's conduct. Rather, we reiterate, at the risk that a reader of this opinion may think that we are unduly repetitious, that we are dealing with an alleged equal protection violation predicated on the circumstance

that Hansen caused only black officers to be initially interviewed with respect to possible discrimination.

In applying *Anderson* we recognize that cases need not be identical for a public officer to be charged that on the basis of precedent he should have recognized that his conduct violated a right that was clearly established. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, ___, 122 S. Ct. 2508, 2516 (2002) (cases with materially similar facts can provide especially strong support for a conclusion that the law was clearly established); *Finn v. New Mexico*, 249 F.3d 1241, 1250 (10th Cir. 2001); *Ulichny v. Merton Comty. Sch. Dist.*, 249 F.3d 686, 706 (7th Cir. 2001). But still it would be a remarkable extension of equal protection principles to hold that the very act of questioning the members of a racial group as to whether they perceived discrimination against the members of that group was in itself unlawful. We are not aware of any case from the Supreme Court or this court that comes close to making such a holding and, in fact, the plaintiffs and the amici curiae do not supply us with any from other jurisdictions.

In the circumstances, we cannot reasonably hold that Hansen objectively should have known that his conduct was unlawful when he directed Moyd and Shambley to question only black officers about discrimination against blacks. A reasonable person in Hansen's position was entitled to obtain his legal guidance from law books rather than a crystal ball. Thus, the equal protection right that plaintiffs advance was not clearly established when Hansen directed that the black officers be interviewed and he is entitled to summary judgment on this ground, which is in

addition to those we already explicated, granting him qualified immunity from plaintiffs' equal protection claims.

IV. *CONCLUSION*

For the foregoing reasons we reverse the order of May 15, 2002, to the extent that it denied Hansen's motion for summary judgment on the basis of qualified immunity on plaintiffs' equal protection claims. We remand the matter to the district court to enter summary judgment in favor of Hansen and for further proceedings on the remaining issues in this case.

REVERSED AND REMANDED

KING, Circuit Judge, dissenting:

The majority today concludes that, consistent with the precepts of equal protection, a chief of police who has received complaints of racial discrimination within his department may select all and only the alleged victims of the discrimination — the department's African-American officers — as targets of an investigation into the complaints. Even if the selection of the African-American officers under these circumstances did not constitute an express racial classification, Chief Hansen nonetheless should not be awarded qualified immunity: Williams and Reaves have alleged specific facts indicating that Hansen's facially neutral classification was both injurious and motivated by discriminatory animus. Under clearly established principles of equal protection, these allegations, if proven, set forth valid claims for the

deprivation of a constitutional right. Thus, in my judgment, the district court correctly held that Hansen had not carried his burden of establishing his entitlement to qualified immunity, and it properly denied his motion for summary judgment. With all respect to my distinguished colleagues in the majority, I dissent.

I.

In concluding that Hansen is entitled to summary judgment on the basis of qualified immunity, the panel majority engages in a traditional *Adarand* analysis, assessing whether Hansen employed an expressly discriminatory classification. Its opinion reasons that "the black and white officers for the purposes of that matter into which Hansen was inquiring, *i.e.*, was there discrimination against black officers in his department, were not similarly situated." *Supra* at 10. As a result, "Hanson could treat the groups differently in directing that officers be interviewed without violating the Equal Protection Clause," and Williams and Reaves "do not set forth valid claims for the deprivation of a constitutional right." *Supra* at 10. According to the majority, there was no express racial classification because Hansen selected not all and only the African-Americans, but rather all and only the alleged victims of intradepartmental discrimination. That those alleged victims were all African American officers did not, on this reasoning, render the classification expressly discriminatory.

The majority opinion goes on to note that "even if plaintiffs' claims charged that officers who in fact were similarly situated were treated differently on the basis of their race, . . . the alleged disparate treatment would survive a strict scrutiny analysis." *Supra* at 14. Finally, it holds in the alternative that "the equal protection right that plaintiffs advance was not clearly established when Hansen directed that the black officers be interviewed [since] it would be a remarkable extension of equal protection principles to hold that the very act of questioning the members of a racial group as to whether they perceived discrimination against the members of that group was in itself unlawful." *Supra* at 18-19.

The majority's analysis, while perhaps correct on its own terms, leaves unexplored an important aspect of the officers' allegations against Hansen. As its opinion acknowledges, the "plaintiffs question the *bona fides* of Hansen's stated motive for pursuing the inquiry, *i.e.*, that he would not tolerate discrimination within the department and desired to take any necessary corrective measures." However, the panel majority dismisses the issue of intent out of hand, stating that "[t]he existence of a factual dispute regarding Hansen's motives does not preclude us from entertaining this appeal even though we cannot resolve disputes of fact." *Supra* at 8.

In my assessment, the dispute of fact as to Hansen's motives in selecting all and only the African-American officers in his department as targets of his investigation cannot so easily be brushed aside. The plaintiffs may fairly be understood to allege that, even

if Hansen employed a facially neutral policy in responding to complaints of discrimination by interviewing all and only those who were within the class of purported victims, that policy both was motivated by discriminatory animus toward African-Americans and adversely effected this group. Thus, even if the majority is correct to conclude that Hansen's selection of interviewees was facially neutral, it remains to be determined whether he is entitled to the protection of qualified immunity.

II.

As the majority opinion acknowledges, *supra* at 7, Williams and Reaves were entitled to prevail against Hansen's motion for summary judgment only if: (1) they had alleged facts setting forth valid claims for the deprivation of a constitutional right, *Saucier v. Katz*, 533 U.S. 194, 201 (2001); and (2) the right was clearly established at the time of the alleged violation such that a reasonable person would have known of it, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Taking the facts, as we must, in the light most favorable to the parties asserting the injury, Williams and Reaves have alleged the violation of a clearly established constitutional right. Twenty-six years ago, the Supreme Court made clear that a facially neutral administrative action that disparately impacts members of a particular racial group will violate the Equal Protection Clause if the plaintiff demonstrates that the action was motivated, at least in part, by an "invidiously discriminatory" intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65

(1977) (remanding equal protection challenge to local authorities' refusal to rezone land to permit racially integrated low-income housing for inquiry into discriminatory intent). The protection against invidious discrimination that hides behind facially neutral policies has become only more firmly entrenched. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 644 (1993); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982); *see also Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995). Because the plaintiffs have made out valid claims for the denial of a clearly established constitutional right, the district court correctly denied Hansen's motion for summary judgment on the basis of qualified immunity.

A.

The Fourteenth Amendment to the Constitution declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To state a race-based claim under the Equal Protection Clause, a plaintiff must allege that a government actor intentionally discriminated against him on the basis of his race. *See id.* at 439-40; *Washington v. Davis*, 426 U.S. 229, 242 (1976); *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 471 (4th Cir. 1999); *Sylvia Dev. Corp.*, 48 F.3d 810 at 818-19.

There are several ways for a plaintiff to make out a valid claim of unconstitutional discrimination. A plaintiff can point to a law or policy that expressly classifies persons on the basis of race. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227-29 (1995)). Or, a plaintiff can identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). A plaintiff can also allege that a facially neutral statute or policy that is neutrally applied nonetheless has an adverse effect on a protected group, and that the adoption of the statute or policy was motivated by discriminatory animus. *See Arlington Heights*, 429 U.S. at 264-65; *see also Hunter*, 471 U.S. at 233 (holding that Alabama constitutional provision, which mandated disenfranchisement of those convicted of crimes of moral turpitude, violated equal protection, because provision was "motivated by a desire to discriminate against blacks on account of race").

Regardless of which of these three forms of intentional discrimination is alleged, the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265 (emphasis added). Rather, a plaintiff need only establish that racial animus was one of several factors that, taken together, moved the decisionmaker to act as he did. *See Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 539 (6th Cir. 2002) (holding that state trooper's possession of some race-neutral basis for initiating investigation was insufficient, standing alone, to entitle trooper to qualified immunity from liability

on plaintiff's equal protection claims if plaintiff could demonstrate that trooper was partly motivated by discriminatory purpose).

Though a valid claim for a violation of equal protection need not allege discrimination as the defendant's *sole* motive, it must allege the requisite discriminatory intent with more than mere conclusory assertions. Thus, to state valid claims for violation of equal protection and thereby to survive Hansen's motion for summary judgment on the basis of qualified immunity, Williams and Reaves must put forward "specific, non-conclusory factual allegations that establish improper motive." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (discussing plaintiff's pleading burden in face of defendant's qualified-immunitybased summary judgment motion, in First Amendment retaliatory termination context)).

Even after a plaintiff has come forward with the requisite specific, non-conclusory factual allegations of an invidious discriminatory intent, determining whether official action was motivated by intentional discrimination remains "a sensitive inquiry." *Arlington Heights*, 429 U.S. at 266. In delving in the minds of state officials, a court may look to "such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another." *Washington*, 426 U.S. at 242. The Supreme Court has since provided further guidance regarding

this "totality of the relevant facts" inquiry. First, and importantly, the Court has recognized that the direct impact of the challenged official action is frequently probative of why the action was taken, since people "usually intend the natural consequences of their actions." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (citing *Arlington Heights*, 429 U.S. at 266). Other relevant considerations include: (1) the historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (2) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (3) contemporary statements by the decisionmaker. *Arlington Heights*, 429 U.S. at 266-68; *see also Sylvia Dev. Corp.*, 48 F.3d at 819 (applying *Arlington Heights* to analyze intent in equal protection context); *Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir. 1981) (same).

B.

To prevail on the merits of their equal protection claim, Williams and Reaves need only prove at trial that Hansen's selection of the targets of his investigation

was motivated in part by discriminatory intent.[1] And at this qualified immunity stage of the suit, it is necessary only that they allege facts from which a jury could conclude that a part of Hansen's motivation in selecting the targets of his investigation was discriminatory animus. Because they have made specific, nonconclusory factual allegations, which, when viewed together and taken as true, raise a reasonable inference that the investigations were prompted at least in part by an illegal motive, Williams and Reaves are entitled to a trial on the merits of their equal protection claim.

The "important starting point" for assessing discriminatory intent under *Arlington Heights* is whether the challenged official action "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (citing *Washington*, 426 U.S. at 242). Hansen's purported policy of selecting for interviews only the alleged victims of intradepartmental discrimination bore not just *more* heavily on one race

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[1] It should be noted that, if initiated for an illegal purpose, the investigation itself is actionable; the plaintiffs need prove no further adverse employment action. *See Hetzel v. County of Prince Williams*, 89 F.3d 169, 171 (4th Cir. 1996) (noting that internal affairs investigation itself constitutes "adverse employment action," depriving employee of a "valuable government benefit" under *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990), and treating such investigation as actionable under § 1983); *see also Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002) (discussing internal affairs investigations as among "adverse employment actions" that could ground § 1983 liability); *Rakovich v. Wade*, 819 F.2d 1393, 1397 (7th Cir. 1987) (holding that investigation undertaken in retaliation for exercise of constitutionally protected rights is actionable under § 1983), *vacated on issue of damages on reh'g*, 850 F.2d 1180 (7th Cir. 1988).

than another. By leading him to investigate all and only the African-American officers, Hansen's policy bore *exclusively* on one race. Thus, under the first *Arlington Heights* criterion, Hansen's decision to adopt the policy that he did strongly evinces a discriminatory intent.

Additional factors that bear on our inquiry include "[t]he historical background of the decision," "[t]he specific sequence of events leading up [to] the challenged decision," and "contemporary statements by [decisionmakers]." *Id.* at 267-68. Under these factors, the plaintiffs have alleged specific facts that would support a finding that Hansen acted with discriminatory intent when he chose to direct his investigation at the victims of possible intradepartmental discrimination.

Viewed in the light most favorable to the plaintiffs, both the historical and the immediate backgrounds of Hansen's investigation bolster their allegations of discriminatory intent. As an historical matter, in February 1996, when the challenged investigation occurred, the City of Fayetteville was under a longstanding consent order to eliminate racial discrimination within its workforce. In the weeks and months preceding Hansen's decision to conduct his investigation, a number of African-American police officers had become increasingly concerned that the Police Department was taking deliberate steps to impede the progress of African-American officers. To address these concerns, the officers had formed a group called "Officers for Equality." In forming this group, the officers intended to oppose acts of discrimination regarding assignments, promotions,

and training. The members of the group believed that the Department had deliberately failed to comply with the terms of the consent order, and they had contacted counsel to learn what legal action could be taken to force the City into compliance. Among the group's concerns was their belief that Hansen had pressured African-American officers, over their objections and with threat of termination, to prepare false written statements attesting to the Department's efforts to comply with the consent order, and asserting that the order was no longer necessary.

In addition to these facts, which suggest both historical and immediate racial discrimination within the Police Department, the plaintiffs note several events contemporaneous with the investigation that is the subject of dispute. From these events, a jury could fairly infer that Hansen holds a general hostility toward the African-American officers and their concerns. Hansen learned of the group "Officers for Equality" over the weekend prior to his decision to initiate the challenged, African-Americans-only investigation. According to the plaintiffs, the questioning that occurred during the interviews was designed to uncover the identities of the members of the group. Furthermore, after requiring all of the African-American officers to participate in interviews regarding their perceptions of discrimination within the Department, Hansen ordered disciplinary action against those among them who were unable to furnish proof to substantiate the very perceptions that they had been required to disclose. Then, in a follow-up memo on the Moyd/Shambley interviews, Hansen instructed his senior staff not only to look for evidence to support

the concerns expressed by some of the African-American officers during the interviews, but also to look for ways to "discredit" the officers' concerns.

As the district court observed, while the purpose of the Hansen's investigation was "ostensibly to discern the existence or prevalence of discriminatory or racist practices or conduct in the Department," "[i]t seems clear from defendants' statement . . . that the Department was not intent on investigating the perceptions of discrimination but rather intent on investigating what the defendants involved considered 'lies.'" *Williams v. Fayetteville*, Mem. Op., 5:99-CV-449-BR(2), at 22 n. 15 (E.D.N.C. May 13, 2002). The "tortuous machinations employed to transform descriptions of perceived discriminatory or retaliatory conduct into 'lies,'" *id.*, lend further credence to the plaintiffs' contention that Hansen ordered the African-Americans-only interviews with discriminatory intent.

These facts, taken together and in the light most favorable to the plaintiffs, are more than adequate to support an inference that Hansen's facially neutral policy of directing his investigation at the purported victims of racial discrimination within the Department was motivated by invidious discriminatory animus. Having made the requisite specific, nonconclusory factual allegations in support of their equal protection claim, the question of motive becomes one for the jury. *See Farm Labor Org. Comm.*, 308 F.3d at 539 (upholding denial of qualified immunity premised on district court's determination that plaintiffs had advanced sufficient evidence to support finding of discriminatory intent and holding that, once this initial burden of

production is satisfied, "[t]he question of whether [an official's] allegedly discriminatory motive played a determinative role in the decision to investigate the plaintiffs . . . is a factual dispute best suited for resolution at trial"); *cf. Koch v. Rugg*, 221 F.3d 1283, 1297-98 (11th Cir. 2000) (holding that court of appeals lacked jurisdiction over interlocutory appeal from denial of qualified immunity where defendants based their appeal solely on alleged lack of evidence to show racially discriminatory intent); *Stella v. Kelley*, 63 F.3d 71, 75 (1st Cir. 1995) (upholding denial of qualified immunity on the ground that court of appeals "lack[s] the power to inquire into . . . the fact-based question of what the evidence does (or does not) show concerning whether the [officials'] actions violated the asserted right — a question that depends, in this case, on the [officials'] motives"). Williams and Reaves have alleged specific facts from which it could be inferred that when Hansen selected all and only the African-Americans officers for his investigation, he was motivated at least in part by discriminatory animus.

C.

When Hansen instituted this investigation almost a quarter of a century after the Supreme Court rendered its decision in *Arlington Heights*, it was eminently well established that a facially neutral administrative action that is undertaken with an intent to discriminate against a particular racial group is forbidden by the Constitution. Accordingly, the district court did not err in denying Hansen qualified immunity from the plaintiffs' equal protection claims.

The "clearly established" prong of the qualified immunity inquiry requires that "the contours of the right . . . be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). "In determining whether a right was clearly established at the time of the claimed violation, 'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (quoting *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)) (alteration in original).

It is not essential that there exist a decided case that is on all fours with the facts at hand in order for public officials to be on fair notice that their conduct violates the Constitution. *See Wilson v. Layne*, 526 U.S. 603, 615 (1999) (holding that precise conduct need not have been previously held unlawful in order for qualified immunity to be forfeited); *Edwards*, 178 F.3d at 251 ("[T]he nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent denial of qualified immunity."); *see also Amaechi v. West*, 237 F.3d 356, 362-63 (4th Cir. 2001) (denying qualified immunity despite absence of factually similar precedent); *McMillian v. Johnson*, 88 F.3d 1554, 1565 (11th Cir. 1996) (same). After all, "qualified immunity was never intended to relieve government officials from the responsibility of applying familiar legal principles to new situations." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) (Michael, J., concurring).

Under the Supreme Court's decision in *Arlington Heights*, Hansen had fair notice that a facially neutral yet discriminatorily motivated administrative action violates equal protection. Indeed, given the unbroken and wide-ranging line of equal protection decisions reaffirming and applying the *Arlington Heights* principle, it is difficult to imagine how the message might have been made clearer. *See, e.g., Shaw*, 509 U.S. at 644 (applying *Arlington Heights* to analyze equal protection challenge to alleged racially discriminatory gerrymander of voting districts); *Hunter*, 471 U.S. at 233 ("[Alabama's disenfranchisement of persons convicted of crimes involving moral turpitude] was motivated by a desire to discriminate against African-Americans on account of race and . . . continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*."); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (applying *Arlington Heights* to evaluate equal protection challenge to alleged racially discriminatory vote dilution); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (applying *Arlington Heights* to analyze equal protection challenge to town officials' withdrawal of town from multimunicipality low-income housing authority, holding district court's finding of racially discriminatory intent not clearly erroneous, and affirming district court's conclusion that town officials violated equal protection); *see also Sylvia Dev. Corp.*, 48 F.3d at 819-24 (applying *Arlington Heights* to analyze national-origin equal protection challenge to county officials' refusal to grant requested rezoning). Under these precedents, a reasonable person in Hansen's position could make no mistake that to adopt with discriminatory animus a facially neutral policy that subjected all and only the African-

Americans in his Department to investigation, would be to violate the equal protection rights of the targeted officers.[2]

D.

As the Supreme Court has observed, the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642 (citing *Washington*, 426 U.S. at 239). Williams and Reaves have made out a claim for precisely this sort of purposeful, race-based discrimination, and they have supported that claim with specific factual allegations. Thus, because Hansen failed to meet his burden of proving that the plaintiffs asserted no valid claims for the violation of clearly established constitutional rights, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), I must part company with my distinguished colleagues in the majority.

I respectfully dissent.

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[2] Though the "clearly established" inquiry is an objective one, it is worth noting that Hansen himself has written and published on the topic of equal protection. *See* Carl Milazzo & Ronald Hansen, *Racial Relations in Police Operations: A Legal and Ethical Perspective* (Published manuscript from the 1999 Conference Materials, International Association of Chiefs of Police) (http://aele.org/losrace99.html).

GREGORY A. WILLIAMS, Plaintiff,

v.

CITY OF FAYETTEVILLE; ROGER STANCIL; RONALD E. HANSEN; JOHN SMITH; RON RABUN; BRADLEY CHANDLER; RICHARD BRYANT; KATHERINE GUILETTE; and STEVE McINTOSH, all individually and in their official capacities with the City of Fayetteville; and the FAYETTEVILLE CITY COUNCIL, Defendants.

VIRGIL HUGH REAVES, Plaintiff,

v.

CITY OF FAYETTEVILLE; ROGER STANCIL, RONALD E. HANSEN; JOHN SMITH; RICHARD BRYANT; SHERRY SPARKS; and STEVE McINTOSH, all individually and in their official capacities with the City of Fayetteville; and the FAYETTEVILLE CITY COUNCIL, Defendants.

No. 5:99-CV-449-BR(2), No. 5:99-CV-450

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION

2002 U.S. Dist. LEXIS 26221

May 9, 2002, Decided
May 13, 2002, Filed
[Entered May 13, 2002]

SUBSEQUENT HISTORY: Reversed by, in part, Remanded by *Williams v.* ***Hansen,*** *326 F.3d 569, 2003 U.S. App. LEXIS 7542 (4th Cir. N.C., 2003)*

DISPOSITION: **[*1]** Defendants' motions for summary judgment allowed in part and denied in part.

CORE TERMS: retaliation, retaliatory, harassment, narcotics, summary judgment, grievance, suspension, interview, untruthfulness, termination, manager, patrol, adverse action, protected activity, retaliatory discharge, discriminatory, racism, fired, equal protection, custom, subjected, municipal, supervisor, discipline, hostile work environment, discriminatory practices, hostile, suspended, anywhere, lying

LexisNexis (TM) HEADNOTES - Core Concepts:

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For Virgil Hugh Reaves, PLAINTIFF (5:99cv450): James H Locus, Jr, Fayetteville, NC USA.

For CITY OF FAYETTEVILLE, ROGER STANCIL, RONALD E. **HANSEN,** JOHN SMITH, BRADLEY CHANDLER, RICHARD BRYANT, KATHERINE GUILETTE, STEVE MCINTOSH, FAYETTEVILLE CITY COUNCIL, defendants (99-CV-449): Philip M. Van Hoy, Van Hoy, Reutlinger, Adams & Dunn, Charlotte, NC.

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JUDGES: W. Earl Britt, Senior United States District Judge.

OPINIONBY: W. Earl Britt

OPINION:

ORDER

This matter is before the court on motions for summary judgment filed by all of the defendants. **[*3]**

Virgil Hugh Reaves and Gregory A. Williams, former police officers for the City of Fayetteville, each filed complaints on 12 July 1999 against the City of Fayetteville (the City), the Fayetteville City Council n1 (the City Council), and various City employees in their individual and official capacities. n2 On 3 February 2000, plaintiffs' actions were consolidated "at least through the discovery phase of the action," with each party retaining the right to file a motion to sever now or at any stage of the litigation should [the party] feel that consolidation is, or becomes, improper." (3 February 2000 Order of Consolidation at 2.)

n1 The City of Fayetteville is a municipal corporation and "city" as defined by *N.C. Gen. Stat. § 160(A)-1(2)*. The City is governed by the Fayetteville City Council. While plaintiffs both named the Fayetteville City Council as a defendant, neither plaintiff named the individual members of the Council as defendants in his amended complaint. The court does not construe the identification of the individual members of the City Council within the body of the amended complaint as a sufficient basis on which to premise a finding that the individual City Council members were named as defendants in the litigation. Accordingly, this action is one against the Council as an entity and not against the respective members of the Council.

To the extent that plaintiffs have tried to sue the Council, the court notes that the Council is merely the governing board of the City, *N.C. Gen. Stat. § 160(A)-1(3)*, and a suit against the Council is therefore tantamount to a suit against the City. The court will consider those defendants as one. See, e.g., *Baker v. Mayor & City Council, 894 F.2d 679, 680 n.1 (4th Cir. 1990)*, cert. denied, *498 U.S. 815*, and overruled on other grounds by, *Berkeley v. Common Council of City of Charleston, 63 F.3d 295 (4th Cir. 1995)*. **[*4]**

n2 Both plaintiffs name the following individual defendants: John Smith, City Manager until his employment was terminated in March 1997; Roger Stancil, Interim City

> Manager from February 1997 through September 1997 and City Manager since 1 December 1997; Ronald **Hansen,** Chief of Police for the City of Fayetteville; Bradley Chandler, a Captain with the City of Fayetteville Police Department; Richard Bryant, Chief of the Office of Professional Standards Department (OPS) within the City of Fayetteville Police Department; and Steve McIntosh, a staff member of OPS who conducted internal investigations in the Police Department. Plaintiff Williams also names former City Manager Ron Rabun, who served in that position from September through December 1997, and city police officer and OPS staff member, Katherine Guilette. Plaintiff Reaves also names city police officer and OPS staff member Sherry Sparks.

Plaintiffs amended their complaints in December 1999 and on 30 March 2001. Their second amended complaints contain the following claims: hostile work environment and various retaliation claims against the **[*5]** City under Title VII; claims against the City and the individual defendants pursuant to *42 U.S.C. § 1983* alleging violations of their *First Amendment,* due process, and equal protection rights; claims against the City and the individual defendants directly under the *First Amendment*; and state law claims against the City and the individual defendants for intentional infliction of emotional distress. Plaintiffs seek injunctive and declaratory relief as well as compensatory damages. Plaintiffs also seek punitive damages from the individual defendants sued in their personal capacities.

Defendant City filed its motion for summary judgment, with supporting affidavits, legal memoranda, and exhibits on 9 April 2001. Both plaintiffs responded to the City's motion on 10 May 2001. The City filed replies to plaintiffs' responses on 23 May 2001. Defendants Roger Stancil, John Smith, and Ron Rabun each filed motions for summary judgment, with supporting affidavits and legal memoranda, on 9 April 2001. Ronald E. **Hansen,** Bradley Chandler, Richard Bryant, Sherry Sparks, Katherine Guilette, and Steve McIntosh filed a joint motion for summary judgment on 9 April 2001 with supporting **[*6]** affidavits and legal memoranda. Plaintiffs jointly responded to all of the remaining motions on 10 May 2001. Stancil replied on 17 May 2001, Rabun replied on 23 May 2001, and Smith and the remaining defendants replied on 24 May 2001. Defendants seek summary judgment on all of plaintiffs' claims.

Facts

This matter involves the separate complaints of two African-American police officers, formerly employed by the Fayetteville City Police Department (the Department). Many of the facts are relevant to both plaintiffs' claims and the timing of the various incidents provides context for the claims of both plaintiffs. For the sake of clarity, however, the court will set forth the salient facts pertaining to Reaves' claims followed by the facts with respect to Williams' claims.

Reaves

Reaves began working for the Department in December 1993, (Reaves Aff. P 3), and, as of 6 March 1995, he was appointed to the position of Police Specialist, (id. P 43). In October 1995, he was removed from Police Specialist status, suspended without pay for ten days, and placed on probation for six months as a result of an investigation prompted by various complaints lodged by Officer Lester Lowe, **[*7]** an African-American police officer in training. (Defs.' J.A., Vol. II, Dep. Ex. 57, 59.) n3

n3 Lowe alleged, among other things, that Reaves had shown racial bias by stating that "black males are being misguided by white women and are led into trouble by them" and by suggesting that he took certain police actions "to help the brothers out." (Id., Dep. Ex. 46.) Sergeant Halstead, Reaves' superior officer, conducted an investigation and concluded that Reaves' conduct constituted unsatisfactory performance, racial harassment, and conduct unbecoming an officer. (Id., Dep. Ex. 59.) Chief **Hansen** accepted Halstead's recommendations with respect to Reaves' discipline.

Reaves alleges that Halstead did not properly investigate Lowe's allegations and suggested that Lowe's allegations were prompted by Reaves' criticisms of Lowe's speeding while driving the patrol vehicles during his training period. (Reaves Opp. at 12.) Reaves also asserts that the charges were not

properly investigated because the Department was willing to "find something on him because he [had spoken out] on discrimination." (Id.) As Reaves concedes, however, he did not appeal or grieve the suspension imposed in November 1995. (Reaves Aff. P 73.)

[*8]

Three months later, in February 1996, Chief **Hansen** undertook an investigation of all African-American officers in the Department during which each officer was questioned about his or her views with respect to discrimination in the Department. n4 (Reaves Step III Hearing, 23 August 1996 at 508.) Chief **Hansen** directed Major George Moyd and Captain Robert Shambley, both African-American senior officers, to conduct interviews with all minority police officers to determine whether any of those individuals had experienced discrimination or perceived discrimination in the Department. Chief **Hansen** required the African-American officers who indicated that they perceived discrimination in the Department to participate in further interviews with Lt. Bryant, Chief of the Office of Professional Standards (OPS) Department, in addition to Major Moyd or Captain Shambley. Subsequently, OPS and a number of supervisors were directed to investigate the officers' reports of perceived discrimination and instructed to support or discredit those reports. (Reaves Aff., Ex. G.) The majority of plaintiff Reaves' claims arise from the February 1996 interviews and the ensuing investigatory process.

n4 In 1972, several African-American police officers brought a class action against the City of Fayetteville alleging that the City was systematically excluding them from assignments and promotions based on their race. The parties ultimately entered a consent judgment geared toward the resolution of the problems presented by the African-American officers. That judgment was in effect at the time the events at issue in this lawsuit took place. In 1995 and 1996, the City began to think about initiating a lawsuit to terminate the consent judgment. Around the same time, a group of African-American police officers who believed that the City continued to limit promotions, assignments and training opportunities for black officers, formed a group called "Officers for Equality" to consider filing suit to enforce the terms of the consent judgment. Chief **Hansen** began his internal investigation of the Department's African-American officers after Officers for Equality began holding its meetings. Although the meetings were held at his church, plaintiff Reaves did not attend them. Plaintiff Williams did attend the meetings. (Williams Dep., Vol. I at 38-44, 57; Reaves Step III Hearing, 23 August 1996 at 183, 508.)

The City argues that plaintiffs' theory of the case is heavily dependent on an allegedly hypothetical connection between the City's efforts to terminate the 1974 Consent Judgment and the Department's internal investigation of allegations of race discrimination and contends

> "that there is no competent evidence, at all, of such a connection." (Defs.' Reply at 9.) Defendants are correct that the court cannot accept speculative assertions by plaintiffs about Chief **Hansen's** alleged motivations as evidence in this case. However, the allegations concerning the discriminatory and retaliatory nature of the internal investigations conducted by Chief **Hansen** certainly are not limited to the connection between those investigations and the 1974 Consent Judgment.

[*9]

Captain Shambley interviewed Reaves on 26 February 1996. (Reaves Aff. P 74.) Plaintiff Reaves had discussed his concerns about discrimination with Captain Shambley in confidence on a number of occasions in the past. (Id. P 75.) During his initial interview with Captain Shambley, plaintiff Reaves indicated that he believed discrimination did exist and explained why. (Id. PP 77-81.) In his brief, plaintiff Reaves provides a catalog of incidents or interactions with co-workers and supervisors, which occurred during his tenure with the Department, that he perceived to be racially discriminatory. (Reaves Mem. in Opp'n to City's Mot. for Summ. J. at 8-12 (hereinafter "Reaves Opp.").) Although he does not provide dates for the majority of these incidents in his brief, (id.), he discussed many of them with Captain Shambley in the February 26 interview. (Defs.' J.A., Vol. II, Dep. Ex. 54 (discussing with Bryant and Shambley issues raised in February 26 interview).)

The following day, 27 February 1996, Reaves was summoned to a meeting with Shambley and Lt. Bryant. (Id. P 82.) He was instructed to recount, in a recorded interview, the detailed allegations of discrimination he had made in his **[*10]** initial interview with Captain Shambley. (Id. PP 82, 86; Defs.' J.A., Vol. II., Dep. Ex. 54.) Reaves explained that, when he spoke with Shambley, he had not anticipated "having to sit down in front of a tape recorder at OPS" to restate his comments, that he had simply answered the question whether he knew of discrimination in the Department or had ever felt that he had been discriminated against, and that he did not want to go into detail discussing the issues again. (Defs.' J.A., Vol. II., Dep. Ex. 54 at 1.) Lt. Bryant responded, "Well, it's not an option at this time. We've been assigned an investigation by the Chief." (Id.) At several points during the ensuing interview, Reaves explicitly stated that he did not want to discuss incidents that he knew of through hearsay, (id. at 15), and that he did not want to give out other officers' names, (id. at 16, 25, 28). He was repeatedly told that he had no choice. (Id. at 15, 16, 25, 28; Reaves Aff. P 86.) At one point, when Reaves declined to provide the names of other officers who believed that discrimination existed, Lt. Bryant read Reaves the Garrity warnings as follows:

> As a police officer involved in an internal investigation, **[*11]** you do not have the right to refuse to answer questions that are directly and narrowly related to your official duties and questions that are narrowly and directly related to this investigation. Employees shall answer all questions honestly, completely, and to the best of their ability. Failure to cooperate, whether by evasion, untruthfulness, or choosing not to answer may result in disciplinary action up to and including dismissal.

(Defs.' J.A., Vol. II., Dep. Ex. 54 at 27.) n5 After he read the warning, Bryant specifically told Reaves that if he did not cooperate and answer all questions honestly he could be fired. (Id.) Subsequent to the reading of the Garrity warning, when Reaves again expressed his reluctance to name other officers who believed there were racial problems in the Department, Lt. Bryant told him he had no option but to respond and that he was "skating on thin ice." (Id. at 28.) Reaves complied.

> n5 See *Garrity v. New Jersey, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967)*(where officers being investigated were compelled to incriminate themselves or forfeit their jobs and officers chose to confess, confessions were not voluntary but rather coerced and *Fourteenth Amendment* prohibited use of such confessions in subsequent criminal proceedings). The Fourth Circuit has explained that Garrity and

subsequent Supreme Court cases dealing with the *Fifth Amendment* rights of public employees have carefully preserved the right of public employers to question employees about matters relating to their job performance. The *Fifth Amendment* violation arises, not when employees are required to answer questions specifically, narrowly and directly related to the performance of their official duties, but when employees are required to waive the privilege against self-incrimination. *Wiley v. Mayor and City Council of Baltimore, 48 F.3d 773 (4th Cir. 1995).*

It is unclear from the record why Garrity warnings were administered in this context, however. Criminal proceedings were not pending, nor were they expected. In any event, plaintiffs in this case have not alleged a violation of their *Fifth Amendment* rights. Rather, the Department's internal investigations and concurrent threats of disciplinary action or termination potentially violate Title VII and plaintiffs' *First Amendment* and equal protection rights.

[*12]

On 28 February 1996, Reaves allegedly was called before Chief **Hansen** and informed that, if he did not prove his allegations of discrimination and retaliation, he would be disciplined. (Reaves Aff. PP 91-92.) On 6 March 1996, Shambley provided **Hansen** with a "Discrimination Fact Sheet" detailing the

comments made by the black officers interviewed at **Hansen's** direction. Also on that day, **Hansen** directed the Majors in the Department to investigate the comments of the minority officers who had indicated the existence of discriminatory or retaliatory practices in the Department during the February investigation as follows:

> Attached are brief comments from minority officers. If the officer is in your Bureau I expect you to do a complete investigation to support or discredit the comments. Your investigation may run parallel to Professional Standards, however, you need to know the perception of your employees and extract the truth first hand. If the employee sheds light on a problem I expect the employee to be commended. If on the other hand the employee is knowingly making vicarious [sic] and damaging comments, I expect discipline to follow.

(Reaves Aff., Exs. G, H.)

On 12 March 1996, Reaves **[*13]** was required to meet with Lt. Bryant once again. (Reaves Aff. P 108.) On that occasion, Lt. Bryant asked him about his involvement with a church meeting organized by a group of African-American police officers to discuss discrimination in the Department. (Id.) The investigation of Reaves' allegations became a wide-ranging investigation of Reaves himself. Representatives of OPS personally interviewed Reaves'

former employers, one of which was located in South Carolina, (Reaves Aff. P 116, Ex. I), and his landlord, (Reaves Aff. P 116).

In May 1996, the Department concluded that Reaves' specific allegations of discrimination and racism within the Department were "untrue," and Chief **Hansen** proposed to terminate Reaves' employment for violating departmental policies regarding "Vexatious or False Complaints and Truthfulness and Cooperation." (Defs.' J.A., Vol. II, Dep. Ex. 50.) Reaves received a Notice of Consideration of Dismissal from Chief **Hansen** on 20 June 1996 and included among Reaves' infractions were his multiple, allegedly unsubstantiated accusations of racism and discrimination within the Department. (Id.) The statements at issue were made in the original meeting between Shambley **[*14]** and Reaves on 26 February 1996.

Reaves received a Notice of Dismissal on 15 July 1996, (id., Dep. Ex. 48), and grieved the termination, n6 (Reaves Aff. P 118). Following the 23 August 1996 hearing before the Personnel Review Board (PRB), the PRB recommended that the Chief's decision to terminate be reversed. City Manager John Smith ultimately reinstated Reaves on 13 September 1996, accepting the recommendation of the PRB and changing Reaves' discipline to a four-week suspension, pending further review by the City Manager's office. (Defs.' J.A., Vol. II, Dep. Ex. 45.) Reaves received a letter from Chief **Hansen** to this effect on 17 September 1996. Chief **Hansen** put Reaves on administrative duty, required him to move rocks, and notified him that

further issues about his performance had come to the Department's attention and that he would remain on administrative duty until those issues were resolved. (Reaves Aff., Ex. L.)

> n6 The City's grievance process operates in three stages. First, a grieving employee meets with his immediate supervisor. Second, the employee has a hearing with the Department Head, there, Chief **Hansen.** At this Step II hearing, an employee is permitted to have counsel, to confront his accusers and to put on evidence. If the employee is unsatisfied with the results of the Step II hearing, the employee may appeal to the City Manager or the Personnel Review Board (PRB). If the employee chooses the PRB, the PRB conducts a de novo hearing and subsequently makes a recommendation to the City Manager. In either case, the City Manager makes the final decision as to whether to uphold or change the decision of the Department Head.

[*15]

The other issues regarding Reaves' performance referenced by Chief **Hansen** occurred in March 1996 and September 1995, six months and a year earlier. The 28 September 1995 incident involved Reaves' conduct at a hearing before Hearing Officer Susan Cole of the Division of Motor Vehicles (DMV), (Defs.' J.A., Vol. II, Dep. Ex. 26), and the March 1996 incident involved schoolteacher Sheila Gillard's complaint that Reaves had flirted with her while in uniform, (Reaves Aff. P

122). Although the incident with Sheila Gillard occurred in March 1996, she did not write a statement or file a complaint against Reaves at that time. (Reaves Aff., Ex. N). In a letter dated 30 August 1996, one week after the PRB had recommended Reaves' reinstatement, Gillard submitted a letter recounting the incident with Reaves. (Defs.' J.A., Vol. II, Dep. Ex. 32.) As for Ms. Cole, she did not file a complaint after the alleged incident occurred and only discussed the incident approximately one year later when Lt. Bryant conducted a recorded interview with her on 23 September 1996. (Id., Dep. Ex. 26.) Attorney Mike Williford was present during the DMV hearing at issue and was the individual who provided Lt. Bryant **[*16]** with the information about the incident involving Reaves on or about 12 August 1996. (Id., Dep. Exs. 25, 27.)

Reaves took a polygraph test on 1 October 1996, which allegedly indicated untruthfulness on his part regarding the Gillard flirtation incident. (Id., Dep. Exs. 37, 41.) On 8 October 1996, Lt. Bryant summarized the findings of the OPS investigations of the Cole and Gillard incidents in a report for Chief **Hansen.** n7 (Id., Dep. Exs. 27, 38.) On 10 October 1996, Sgt. Dalton recommended that Reaves be dismissed based on his "blatant and unwanted flirtation with" Gillard, his conflicting statements about the incident, and his "continued violations of the rules [and] regulations ... of the Fayetteville Police Department." (Id., Dep. Ex. 39.) On 14 October 1996, Lt. Hyde recommended that Reaves be dismissed based on repeated violations of different Department rules and regulations over the preceding year. (Id., Dep. Ex. 40.) Based on the results

of the second round of investigations, and the ensuing recommendations, Chief **Hansen** once again terminated Reaves on 25 November 1996. (Id., Dep. Ex. 63.) Although the PRB once again recommended reversal of the decision on 2 January 1997, (Reaves **[*17]** Aff., Ex. P), City Manager John Smith upheld the Chief's decision by letter dated 8 January 1997, (Defs.' J.A., Vol. II, Dep. Ex. 62).

n7 In this memorandum, Lt. Bryant indicated that he had run into attorney Mike Williford in the Cumberland County Courthouse on or about 12 August 1996 and reported the following conversation:

> [Mr. Williford said] "Let me tell you something, but if you repeat it I will deny it." Mr. Williford said he had a bunch of black officers come to him and ask him to represent them. He said he sent them away. He went on to say that he was surprised we didn't fire Virgil Reaves a long time ago. He further stated that he had been at a DMV hearing with Reaves and when the Hearing Officer found for the defendant Reaves started telling the Hearing Officer that she was biased."

(Defs.' J.A., Vol. II, Dep. Ex. 27.)

Plaintiff Williams

As of 1995, Williams was employed by the Department as a narcotics Investigator in the Narcotics Division. (Williams Aff. P 3.) Williams participated **[*18]** in Officers for Equality, the group of African-American officers formed in early 1996 to address concerns about racism and discrimination within the Department. (Id. P 7.) n8 Plaintiff Williams applied for a promotion to Homicide Investigator in March 1996, which he was denied. (Id. PP 29, 31.) On 30 April 1996, Williams wrote a letter to his supervisor, defendant Captain Bradley Chandler, conveying his disappointment with the fact that he was not interviewed for the position. He said that the thought "Blacks can't go anywhere in this department, except Narcotics" "started running through [his] head" when he realized that he had not been interviewed before the Department selected someone for the position (Defs.' J.A., Vol. III, Dep. Ex. 102.) He emphasized that he was not lodging a complaint but rather stating a justified concern. (Id.) Williams also sent a copy of his letter to Lt. Bryant of OPS. (Id.)

> n8 Like Reaves, Williams was interviewed as part of Chief **Hansen's** investigation of the minority officers in February 1996, (Williams Aff. P 9) and, like Reaves, he identified some discriminatory practices within the Department, (id. P 13). However, his comments were allegedly attributed to another officer, and the investigation was not continued with respect to him.

[*19]

Captain Chandler conveyed the letter to Chief **Hansen** on 1 May 1996. (Id., Dep. Ex. 105.) Later that day, Williams was transferred from Narcotics to Patrol upon the direction of Chief **Hansen.** (Williams Aff. P 53; Defs.' J.A., Vol. III, Dep. Ex. 105.) Also on 1 May 1996, Captain Chandler authored a memo to all of the African-American officers in the Narcotics Division requiring that they acknowledge that their assignment to that division was unrelated to their race in order to remain in their current assignments in that division. (Williams Aff., Ex. H.)

Williams grieved his transfer to Patrol by participating in a Step II grievance hearing with Chief **Hansen** and by subsequently appealing Chief **Hansen's** decision to City Manager John Smith. (Williams Aff. PP 57, 59.) At his Step II hearing with Chief **Hansen** on 17 May 1996, Williams expressed a belief that discrimination existed in the Department in many forms and stated that he had spoken with other officers who felt the same way. (Id. P 63.) Immediately following his own Step II hearing on 17 May 1996, Williams attended the grievance hearing of co-worker Officer Karen Sweeney. n9 (Id. P 62.) During Sweeney's hearing, Williams indicated **[*20]** that other black officers probably felt discrimination existed in the Department but were too afraid to come forward because of intimidation, discrimination, and retaliation. (Defs.' J.A., Vol. III, Dep. Ex. 127 at 12.) Chief **Hansen** stopped Sweeney's grievance proceeding, directed Lt. Bryant to conduct an investigation into Williams' statements, and ordered Williams to provide names of officers who felt discrimination or retaliation existed.

(Id. at 9; Defs.' J.A., Vol. III, Dep. Ex. 121 at 22, 23.) n10 After a fifteen to twenty minute recess, Williams appeared before Lt. Bryant who began a formal OPS investigation of Williams' comments about racism in the Department. (Defs.' J.A., Vol. III, Dep. Ex. 127 at 9-10.) In the context of that meeting, Bryant read Williams the Garrity warnings and ordered him to provide the names of other African-American officers who felt discrimination and retaliation existed in the Department. (Williams Aff. PP 66-67; Defs.' J.A., Vol. III, Dep. Ex. 112 at 1.) Williams stated that he had not said he had names of individuals to offer but that he was speaking generally about the environment. n11 Ultimately, because he feared that he would be fired if he **[*21]** did not comply with Bryant's demands, (Williams Aff. P 74), Williams provided the name of Officer Angela Pollard, a member of Officers for Equality, and stated that Pollard said "she feels that she couldn't go anywhere but Narcotics," (Defs.' J.A., Vol. III, Dep. Ex. 112 at 1; Williams Dep., Vol. I at 37, 38, 40). Asked to restate Pollard's complaint, Williams said, "She just said that she feels she couldn't go anywhere but Narcotics, look where she's been, Narcotics, Patrol, Narcotics, Patrol. That's it. Narcotics and Patrol. That's it. No more than that." (Defs.' J.A., Vol. III, Dep. Ex. 112 at 3.) Williams also added that "she didn't say anything about intimidation, retaliation or discrimination." (Id. at 2.)

n9 Officer Sweeney had made a statement about Blacks being limited to Narcotics and Patrol in the course of the investigation of racism in the Department initiated by Chief **Hansen** in February 1996. After Williams

submitted his 30 April 1996 letter to Captain Chandler containing a similar comment, Sweeney was transferred from Narcotics to a night shift position on 1 May 1996. (Williams Aff. PP 51-52.) Sweeney, like Williams, grieved her involuntary transfer. **[*22]**

n10 Defendants claim that, during Sweeney's hearing, plaintiff Williams said he would provide names. Williams claims he did not make that statement. (Williams Aff. P 65.) The proceeding in which the comment was made was not recorded, despite the fact that Williams had requested that it be recorded, and the court will assume, for purposes of this motion, that Williams did not state that he would provide names.

Specifically, defendants maintain that Williams stated that he would provide the names of those officers concerned about discrimination, intimidation and retaliation in the Department. (Defs.' J.A., Vol. III, Exs. 111 (Chandler statement), 113-16, 119.) According to Lt. Bryant, it was only after **Hansen** instructed Bryant to make an investigation into Williams' allegations that **Hansen** "told Williams that this time he [Williams] was going to cooperate with investigators by giving officers' names. Williams then said 'I'll give you officers' names.' Chief **Hansen** then told Williams he was being ordered to cooperate during the investigation." (Id., Ex. 116.) Captain Shambley provided a similar recounting of the incident, noting that

Williams stated he would provide names only after the Chief advised him that "he would have to call names this time." (Id., Ex. 117.) Captain Chandler stated that Williams said he would provide names after being ordered to do so but stated that the officers might deny experiencing discrimination and retaliation. Williams' testified in his Step III hearing before City Manager John Smith that Lt. Bryant gave him a direct order during Sweeney's grievance hearing that he would have to give names. (Id., Ex. 121 at 22, 23.) Williams claims that he did not state that he would supply names. (Id., Ex. 112 at 1.) Even if the court were inclined to accept defendants' assertion that Williams stated he would provide names, the court would conclude, after reviewing the evidence submitted, that Williams made that statement only after being ordered to cooperate by Chief **Hansen** and Lt. Bryant during Sweeney's grievance hearing. **[*23]**

n11 In his affidavit, Williams states that in making the statement in question he was speaking generally about the working environment for black officers in the Department in the wake of the investigation initiated by **Hansen** in February of that year and the general awareness of the treatment of the black officers who had spoken up about discrimination in the Department in the course of those investigatory interviews. (Williams Aff. P 87.) Williams further stated that he was trying to inform **Hansen** of the fact that other black

> officers who felt discrimination existed would probably deny it if asked in order to avoid the type of investigations and discipline imposed on Reaves, Williams, and Sweeney. (Id. P 88.)

Following his interview with Bryant, Williams left for the day because he was upset. (Williams Aff. PP 80-81.) A subsequent psychological evaluation indicated that he was suffering from "clinically significant situationally induced anxiety symptoms" and should consider taking time off. (Williams Aff., Ex. G.) Williams was eventually cleared to return to his position as of 19 July 1996. (Id. **[*24]**)

Meanwhile, upon investigation by OPS, Officer Pollard ultimately denied having made the-specific statement "Blacks can't go anywhere but Narcotics." (Aff. P 78; Defs.' J.A., Vol. III, Dep. Ex. 11.) When interviewed by OPS on 28 May 1996, Officer Pollard stated that she had not been subject to discrimination, intimidation or retaliation in the Department, a statement that happens to correspond precisely to Williams' testimony in the May 17 Bryant interview. (Id.; Defs.' J.A., Vol. III, Dep. Ex. 112 at 3.) The court also notes that Pollard's statement to OPS on May 28 was in accord with the statement she was essentially required to make in response to Chandler's memo to the black officers in Narcotics dated 1 May 1996 in order to remain in her position in Narcotics. Pollard also went on to say in the OPS interview, however, that she had heard Williams say that the only place he had seen blacks go in the Department is to Narcotics or Patrol and that she had said to Williams in response,

"come to think about it, in seven years those are the only two places I have been." (Id., Dep. Ex. 119.)

On 31 May 1996, Williams attended a Step III hearing with City Manager John Smith, Chief **Hansen, [*25]** Chandler and others with respect to his April 30 letter and his May 1 transfer. (Id., Dep. Ex. 121.) On 7 June 1996, Smith wrote a memorandum to Williams stating that Williams did not request any specific resolution by Smith's office of Williams' concern and that Smith could only conclude that Williams' sole purpose was to voice his concerns. (Id., Dep. Ex. 122.) Although Williams had specifically grieved his transfer to Patrol in retaliation for writing the letter about the interview process for the homicide investigator position, he was not reassigned to his previous position in Narcotics, n12 and Chief **Hansen's** decision to transfer Williams was therefore affirmed. (Id.; Williams Aff. P 59.) Smith went on to explain that Williams had made several statements during the course of the Step III hearing that Major Moyd, Captain Shambley, Chief **Hansen** and others had lied about his comments with respect to his letter and during the grievance procedure, that the statements were serious allegations, and that the statements would require further investigation. (Defs.' J.A., Vol. III, Dep Ex. 122.)

> n12 While it is unclear whether Smith would have reinstated Williams to his position in Narcotics had he believed Williams wanted to return to his old position, Smith relied on a statement by Williams in the course of his Step III hearing that he was not asking to be transferred back to his previous assignment and

> that he did not know what he was asking for as a basis for leaving Williams in his Patrol position. (Defs.' J.A., Vol. III, Dep. Ex. 121 at 8.) Defendants' exhibit 101, however, indicates that Williams initiated the grievance procedure on 5 May 1996 to obtain a transfer back to his previous assignment in Narcotics.

[*26]

On 14 June 1996, Chief **Hansen** received a memorandum from Major Moyd setting forth Moyd's opinion about Williams' perceived insubordination and disrespect during the grievance hearing process and informing Williams that he was recommending his termination. (Id., Dep. Ex. 123.) On 18 June 1996, Williams received a Notice of Consideration for Dismissal from Chief **Hansen,** notifying him that he would be fired for untruthfulness and uncooperativeness and setting forth the following specific grounds for dismissal pertaining to Williams' lack of truthfulness and cooperation:

> 1) Making the statement during the 17 May 1996 grievance hearing of Karen Sweeney that other officers felt there was intimidation, retaliation and discrimination and then, when ordered to provide names, refusing and denying making the statement as well as subsequently accusing all staff officers present at the hearing with John Smith of lying; n13

2) Alleging that Officer Angela Pollard said she feels she could not go anywhere but Narcotics when Pollard subsequently denied making that statement;

3) Denying during the May 17 hearing having made the allegation that black officers can only go to Narcotics **[*27]** when Williams had previously written a letter containing that statement to his supervisor and OPS. n14

n13 As noted above, the evidence submitted by defendants indicates that Williams did make the statement that other officers probably felt there was intimidation, discrimination and retaliation but that there was a dispute over whether Williams stated that he would provide the names of the other officers, and if he did so, whether he did so willingly. See, supra note 10. Contrary to **Hansen's** statement in the June 18 letter, the record does not support the assertion that Williams denied making the statement about the intimidation, discrimination and retaliation in the Department.

n14 Apparently, during the course of his Step II hearing, Williams stated that he did not allege that Blacks couldn't go anywhere but Narcotics but rather said, in the text of his letter, that the thought ran through his head that Blacks can't go anywhere but Narcotics. Chief **Hansen** apparently characterized this attempted

distinction as a lie or an example of untruthfulness.

[*28]

(Id., Dep. Ex. 125; Williams Aff. P 85.) The letter informed Williams that he was being placed on suspension and that he had a right to grieve the suspension. (Defs.' J.A., Vol. III, Dep. Ex. 125.) As a result of the 18 June 1996 letter, Williams' name was removed from a list of officers being considered for a School Resource Officer (SRO) position. (Williams Aff. P 94.) Williams initiated a grievance regarding the suspension on 25 June 1996. (Defs.' J.A., Vol. III, Dep. Ex. 126.) A Step II hearing was held on 9 July 1996, at which Williams was represented by an attorney. (Id., Dep. Ex. 127.) On 11 July 1996, Chief **Hansen** wrote Williams a letter advising him that because his untruthfulness and insubordination were isolated incidents and because his discipline record was otherwise clear, he had decided not to terminate his employment but instead would impose a 20-day suspension without pay and a six-month work probation during which he could be terminated for violating any rule or regulation. (Id., Dep. Ex. 128.)

Williams served his 20-day suspension and returned to work on or around 23 July 1996. (Defs.' J.A., Vol. III, Dep. Ex. 130) At that time, Major Cannady informed Williams **[*29]** that he would not consider Williams for the position of SRO in the Cumberland County School System for which Williams had applied in May 1996 because of the charges that had been lodged against him. (Williams Aff. P 94.)

Williams grieved both his removal from the list for the SRO position and the 20-day suspension. (Williams Aff. PP 95-96.) Chief **Hansen** refused to change either decision, and City Manager John Smith affirmed both decisions in August 1996. (Id. P 96.) On 1 October 1996, Williams filed a charge of discrimination with the EEOC alleging retaliation and race discrimination under Title VII. (Defs.' J.A., Vol. II, Dep. Ex. 10.)

At some point during this process, the NAACP learned of the complaints of several African-American police officers with respect to discriminatory practices within the Department. Representatives of the NAACP met with defendants John Smith, Roger Stancil, and Chief **Hansen** on 12 September 1996 and 25 September 1996 and discussed the concerns of the NAACP regarding some police department practices. (Pls.' Mem. in Support of Mot. to Compel, Attach. HH; Stancil Aff. PP 21, 22.) On 16 December 1996, the NAACP presented plaintiffs' cases, along with the **[*30]** case of Officer Karen Sweeney, to the City Council, requesting that an independent investigation by a third party be conducted to review the Department's actions with respect to these officers. (Pls.' Mem. in Support of Mot. to Compel, Attach. II; Reaves Aff., Ex. U; Torrey Aff. PP 5, 6.)

On 17 February 1997, after considerable debate and controversy, defendant then-City Manager John Smith's contract was terminated, and defendant Stancil was named Interim City Manager. (Stancil Aff. P 25.) Also on 17 February 1997, the City Council discussed the selection of a special investigator or consultant to

implement an investigation into the race problems affecting the Department, which had been approved by the Council on 27 January 1997. (Stancil Aff., Ex. 1 at 554-72.) Thereafter, in March 1997, the City Council employed Cheryl Grant to conduct an independent investigation into the Department's allegedly discriminatory practices (Defs.' J.A., Vol. II, Dep. Ex. 13 at 31; Stancil Aff. P 31.) Grant issued a report on 27 August 1997, (Stancil Aff. P 36), concluding that evidence existed to show that the City retaliated against Fayetteville police officers and recommending that the City review **[*31]** the disciplinary actions taken against plaintiffs Williams and Reaves. (Defs.' J.A., Vol. II, Dep. Ex. 13 at 14, 14b.) Plaintiffs allege that nothing was done to alleviate the situation and that the retaliation continued. (Reaves Aff. P 174; Williams Aff. P 111.)

Between November 1996 and February 1997, other incidents occurred, a few of which Williams grieved, but in each of those cases he ultimately decided to drop or withdraw the grievance before it reached Step III proceedings. (Defs.' J.A., Vol. II, Dep. Exs. 140, 142-48, 151.) However, on 23 February 1997, an incident occurred in which Williams was bitten by a dog while on duty and, based on his belief that Chief **Hansen** left the scene without speaking to him, Williams concluded that Chief **Hansen** did not show the appropriate level of concern about his injury. (Williams Aff. PP 112-13; Defs.' J.A., Vol. II, Dep. Exs. 145, 172.) Chief **Hansen** initiated an investigation of Williams' conduct on 21 March 1997. (Defs.' J.A., Vol. II, Dep. Ex. 172.) On 10 July 1997, **Hansen** issued Williams yet another Notice of Consideration of

Dismissal based, in part, on Williams' lack of truthfulness with respect to the dog-bite incident. (Id., Dep. **[*32]** Ex. 152.)

Williams grieved the dismissal and a Step II hearing was held on 1 August 1997, subsequent to which Williams agreed to participate in a polygraph test. (Id., Dep. Ex. 153.) Chief **Hansen** held his decision in abeyance pending a polygraph test, the result of which was not favorable to Williams, and **Hansen** informed Williams that his employment was terminated in a letter dated 15 August 1997. (Id.) Williams proceeded to grieve his dismissal to the PRB and finally to City Manager Ron Rabun. (Williams Aff. PP 133, 134, 140.) Rabun sent Williams a letter upholding the termination dated 6 November 1997. (Defs.' J.A., Vol. III, Dep. Ex. 154.) In that letter, defendant Rabun referenced Williams' statements from the 17 May 1996 grievance hearing, following his transfer to patrol, and his statements from February 1997 regarding continuing retaliation. (Id.) Williams filed a second charge with the EEOC on 18 March 1998, alleging retaliatory discharge. (Defs.' J.A., Vol. II, Dep. Ex. 11.)

The EEOC began its investigation based on Williams' first EEOC charge in February 1997, (Williams Aff. P 116), and, in July 1998, determined that probable cause existed to support Williams' allegations **[*33]** that the City of Fayetteville had violated Title VII, (Williams Aff., Ex. P).

In sum, both plaintiffs contend that they voiced opposition to the Department's discriminatory practices and that, after doing so, their statements were described as "lies" and they were variously subject to demotion, discipline, suspension, and ultimately, termination. Defendants, on the other hand, maintain that plaintiffs made demonstrably false statements and were accordingly fired for lying, which is inconsistent with effective police work. (Def. City's Consolidated Reply to Pls.' Opp'n to Motion for Summ. J. at 10.)

Motion for Summary Judgment

Summary judgment is appropriate in those cases in which there is no genuine dispute as to a material fact, and in which it appears that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c); Haavistola v. Community Fire Co. of Rising Sun, Inc., 6 F.3d 211, 214 (4th Cir. 1993).* Summary judgment should be granted in those cases "in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Id.* In **[*34]** making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991).*

Defendants have emphasized the fact that plaintiffs did not take any depositions in this case. In support of their arguments and their case, plaintiffs have submitted their own affidavits and exhibits as well as the affidavits of three interested individuals. This court can consider testimony provided by affidavit only to the extent that the testimony is based on personal knowledge. *Fed. R. Civ. P. 56(e)*("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") The court cannot rely upon speculation, hearsay, legal conclusions or unsubstantiated opinion in resolving a motion for summary judgment. **[*35]** See *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 62 (4th Cir.1995)* (unsupported speculation insufficient to defeat summary judgment). The court may, however, rely on the voluminous exhibits submitted by both parties, including numerous internal administrative memoranda from the Department, in its consideration of the motions before it. Many of these documents provide direct and circumstantial evidence in support of plaintiffs' claims.

Discussion

At times, the nature of the parties' arguments on brief in this matter evoke the image of a third-grade playground fight of the "Did not! Did too!" variety. Serious allegations of racism, discrimination, and retaliation deserve a more elevated level of discourse and, at the very least, require a more precise use of

language. A clarification of the meaning of one term frequently used by the parties in this case is in order. A "lie" is defined by Webster's Dictionary as a "false statement deliberately presented as being true" and as "something meant to deceive or give a wrong impression." Vitriolic accusations of lying abound throughout the events giving rise to plaintiffs' cause of action and in the **[*36]** briefs before the court. While the court must assume that the individuals in this case are aware of the meaning of the word "lie," the definition of that term appears to merit re-examination in the context of allegations of discrimination. To discriminate means to act on the basis of prejudice. Actions do not exist in a vacuum but rather are viewed through the lens of personal experience and are thus subject to differing interpretations. In short, an individual's description of conduct experienced as discriminatory or racist is not readily susceptible of characterization as a "truth" or a "lie." Perhaps ironically, discrimination is not simply a black and white issue. The rather tortuous machinations employed to transform descriptions of perceived discriminatory or retaliatory conduct into "lies" are, at best, disingenuous and, at worst, a particularly heinous form of retaliation in and of themselves. n15 In other words, the fact that plaintiffs' perceptions of discrimination may be unfounded, that they cannot be proven, or even that their claims may not be actionable under Title VII or *§ 1983* does not make plaintiffs "liars," and the court finds defendants' persistent use of such **[*37]** terminology, aside from being imprecise and possibly inaccurate, a tactic that merely serves to obscure rather than to elucidate the important issue before the court -- whether or not plaintiffs experienced

discrimination and retaliation while employed by the Department.

> n15 Defendants state in their Reply, "Lying must be investigated, and if it is proved, lying must be punished." (Reply at 11.) This statement reveals volumes about defendants' conduct in this matter. The purpose of the various investigations commenced by Chief **Hansen** was ostensibly to discern the existence or prevalence of discriminatory or racist practices or conduct in the Department. It seems clear from defendants' statement, however, that the Department was not intent on investigating the perceptions of discrimination but rather intent on investigating what the defendants involved considered "lies."

The terminology issue takes on added resonance in the context of the Title VII claims before the court. While Title VII cannot successfully be **[*38]** invoked to insulate indiscriminate lies, Title VII does protect an employee's ability to raise issues of discrimination and retaliation in good faith, regardless of whether the allegations involved ultimately turn out to be true. Accordingly, an approach pursuant to which an employer attempts to discern the truth of an allegation and disciplines an employee if the allegation simply does not turn out to be supported by evidence would not be consistent with the protections or purposes of Title VII.

With these principles in mind, the court will now turn to an analysis of defendants' motions for summary judgment with respect to plaintiffs' various claims in the following order: Title VII hostile work environment; disparate treatment in violation of Title VII; Title VII retaliation, retaliatory discharge and retaliatory harassment; § *1983* claims based on alleged violations of due process, equal protection and the *First Amendment*; a direct claim under the *First Amendment*, to the extent plaintiffs make such a claim; and intentional infliction of emotional distress. Within each of the following sections, the court will address plaintiffs' claims with respect to the City and then with respect **[*39]** to the individual defendants, as applicable.

I. Title VII

A. Timeliness of Plaintiff Williams' EEOC Charges

On 1 October 1996, while still employed by the Department, plaintiff Williams filed a charge with the EEOC alleging that the Department retaliated against him because he conveyed a concern that black police officers were assigned only to the narcotics and vice unit. (Defs.' J.A., Vol. II, Ex. 10.) Williams was subsequently discharged and has alleged, in a second charge filed with the EEOC on 18 March 1998 and in the context of this action, that he was discharged in retaliation for filing his initial charge with the EEOC in October 1996 and for complaining of discriminatory treatment. (Id., Ex. 11.) Defendants argue that Williams' retaliatory discharge claim under Title VII is not timely

because Williams failed to file his second EEOC charge with respect to the retaliatory discharge within 180 days of the date of his actual discharge. The City asserts that Williams was discharged on 11 July 1997, the date on which Williams received his Notice of Consideration of Dismissal, and that his second EEOC Charge should have been filed within 180 days of that date. Williams contends, **[*40]** on the other hand, that the filing period did not begin to run until former City manager Ron Rabun affirmed Chief **Hansen's** decision to terminate Williams' employment on 7 November 1997. However, the court need not determine the exact date on which Williams was officially fired in order to conclude that Williams' retaliatory discharge claim is not subject to dismissal.

Williams' October 1996 EEOC charge included an allegation of retaliation. A plaintiff need not file a second EEOC charge to complain about retaliatory discharge when that plaintiff already has a charge pending with the EEOC and the claims are related, particularly when the original charge alleged retaliation. In *Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992)*, the Fourth Circuit reiterated the

> "generally accepted principle that the scope of a Title VII lawsuit may extend to 'any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission.'"

Id. (explicitly addressing "whether a plaintiff asserting a Title VII claim of retaliation for filing a previous EEOC charge must exhaust **[*41]** administrative remedies before suing in federal court" and holding that a plaintiff did not have to do so) (citations omitted). It was not necessary for Williams to file a second charge with the EEOC about retaliatory discharge because the EEOC was already investigating Williams' allegation that the Department was retaliating against him. See *McKenzie v. Illinois Dept. of Transp., 92 F.3d 473, 482 (7th Cir. 1996)* (charges of retaliation arising after original charge filed may be brought without double filing with *EEOC); Smith v. Denver Public School Bd., 41 F.3d 1516, 1994 WL 651978,* **6 (10th Cir. Nov. 18, 1994) (citing *Brown v. Hartshorne Pub. Sch. Dist. No. 1, 864 F.2d 680, 682* (10th Cir. 1988), for proposition that where a complainant files an EEOC charge, conduct occurring after the filing that is "reasonably related" to the original charge, may be challenged in district court without filing an additional charge); *Malarkey v. Texaco. Inc., 983 F.2d 1204, 1208-10 (2nd Cir. 1993)* (the "reasonably related rule" allows judicial redress of retaliation claims arising after EEOC filing"); *Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3rd Cir. 1976)* **[*42]** (the "parameters of a civil action in the District Court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charges of discrimination, including new acts which occurred during the pendency of proceedings before the Commission"), cert. denied, *429 U.S. 1041, 50 L. Ed. 2d 753, 97 S. Ct. 741 (1977); Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3rd Cir. 1984)* ("a district court may assume jurisdiction over additional charges if they are

reasonably within the scope of the complainant's original charges and if a reasonable investigation by the EEOC would have encompassed the new claims"); *Best v. McDonald's Corp., 1999 U.S. Dist. LEXIS 2564, 1999 WL 1940014, *4 (E.D.N.C. Jan. 22, 1999)*(denying motion to dismiss retaliatory discharge claim explaining that "under *Nealon,* plaintiff's failure to file a second charge of discrimination alleging retaliation does not preclude him from including a retaliation claim in his Title VII suit in federal court."). n16

> n16 As in Best, plaintiff Williams has essentially alleged a situation in which the retaliation begun on the basis of the statements he made about race in the letter he submitted on 30 April 1996 continued in one form or another until he was ultimately discharged in 1997.

[*43]

The court concludes that Williams' retaliatory discharge claim is based in part on the same course of conduct at issue in his original EEOC charge and in part on alleged retaliation for the filing of the October 1996 charge. This court could therefore properly exercise jurisdiction over the retaliatory discharge claim in the absence of a second EEOC charge, and the filing of such a charge does not render such an exercise of jurisdiction improper.

B. Title VII Claims on the Merits

The precise nature of some of plaintiffs' Title VII claims against the City n17 is difficult to discern. The amended complaints can be construed to state the

following claims: Title VII hostile work environment based on race; disparate treatment in violation of Title VII; and Title VII retaliation, retaliatory discharge and retaliatory harassment. At the outset, the court concludes that plaintiffs have not submitted evidence to support even prima facie claims of hostile work environment based on race n18 or of disparate treatment, n19 and the court will allow the City's motion for summary judgment to the extent plaintiffs have attempted to assert such claims.

n17 On 4 February 2000, the parties entered into a stipulation voluntarily dismissing with prejudice the Title VII actions against the individually named defendants. **[*44]**

n18 While plaintiff Williams' amended complaint includes race as a basis for the alleged hostile work environment he experienced in the Department, Williams' allegations, taken as a whole, reveal his belief that he was subjected to a hostile working environment in response to his comments about discrimination in the Department and in retaliation for exercising his *First Amendment* rights and his opposition to the systematic practice of discrimination against African-American officers. The court cannot locate within Williams' amended complaint facts that would support a claim of hostile work environment based on his race.

Likewise, plaintiff Reaves' argument regarding hostile work environment is based on retaliatory rather than racial harassment. (Reaves Opp. at 31-32.)

n19 The court can discern only two potential bases for disparate treatment claims: the Department's promotion practices and allegedly disparate disciplinary practices. Although plaintiff Williams' letter to Captain Chandler expressed concern about the promotion process within the Department, Williams has not alleged, in the context of this lawsuit, that the Department's promotion process was discriminatory or that he was denied a promotion to Homicide Investigator for racially discriminatory reasons. Rather, plaintiff Williams' allegations concern the Department's retaliatory conduct towards him based on his expression of concern regarding possibly discriminatory practices. Accordingly, the court does not construe Williams' complaint as stating a claim of discriminatory treatment based on the Department's promotion practices.

Secondly, plaintiffs seem to argue that other employees who engaged in similar misconduct of comparable seriousness received less severe punishment than they did. Plaintiff Williams' amended complaint, however, does not contain a claim of disparate discipline, and it appears to the court that plaintiffs may emphasize the lack of comparable discipline in an effort to bolster their argument that the

> disciplinary measures taken against them were retaliatory. In any event, plaintiffs have not provided the court with evidence of the punishment or disciplinary measures taken with respect to other officers, other than their own speculations and testimony, and thus have not stated a claim for disparate treatment.

[*45]

The web of allegations offered by plaintiffs in support of their retaliation claims is much more complex and defies easy categorization. The seminal events for Williams are as follows: the transfer from Narcotics to Patrol; the attempted termination that was converted to a 20-day suspension; and the discharge. The seminal events for Reaves are: an attempted termination converted to a four-week suspension; an additional period in which he was placed on administrative duty that involved the shoveling of rocks and further investigation by OPS; and the discharge. These events, intermittently punctuating a seemingly incessant course of coercive investigations, comprise the basis of plaintiffs' retaliation claims. The court will analyze the foregoing events as discrete examples of adverse actions in the context of plaintiffs' retaliation claims where appropriate and, in conjunction with the investigations, interrogations, and other alleged mistreatment, as a course of retaliatory harassment culminating in plaintiffs' discharge.

A statement of the applicable law will help elucidate the relationship between a traditional retaliation claim and a claim of retaliatory harassment.

Under *42 U.S.C. § 2000e-3* **[*46]** *(a)*, it is "an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *42 U.S.C. § 2000e-3(a) (1994)*. To prevail on a claim for retaliation or retaliatory discharge under Title VII, plaintiff must show that he engaged in protected activity, that the employer took adverse employment action against him, and that a causal connection existed between the protected activity and the adverse action. *Tinsley v. First Union National Bank, 155 F.3d 435, 443 (4th Cir. 1998)*; *Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998)*(describing elements of retaliatory discharge); *Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir.)*, cert. denied, *519 U.S. 818, 136 L. Ed. 2d 30, 117 S. Ct. 70 (1996)*.

An understanding of the concept of "protected activity" is important to an understanding of the disposition **[*47]** of the motions before the court. Title VII is intended to protect employees who oppose discrimination in the workplace or participate in EEOC proceedings, and case law suggests that, when made in opposition to discriminatory or retaliatory practices, employees do not have to prove their allegations nor must such allegations even be true to qualify for protection. See *Hooven-Lewis v. Caldera, 249 F.3d 259, 273 (4th Cir. 2001)*(citing *Balazs v. Liebenthal, 32 F.3d 151, 158 (4th Cir.1994)* for proposition that expressions of discrimination, even where not true, constitute

protected activity); *Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994)* ("an erroneous belief that an employer engaged in an unlawful employment practice is *reasonable,* and thus actionable under *§ 704(a),* if premised on a mistake made in good faith. A good faith mistake may be one of fact or law."), cert. denied, *513 U.S. 1081 (1995); DeWitt v. Mecklenburg Co., 73 F. Supp.2d 589, 602 (W.D.N.C. 1999)*(a Title VII plaintiff "is not required to establish the validity of the underlying allegations of a Title VII violation; nonetheless, in order **[*48]** to establish a retaliation claim, 'the plaintiff must believe in the validity of the claim, and that belief must be reasonable'")(citations omitted). A clear understanding and application of this rule is especially necessary where plaintiffs have been disciplined and fired because their statements about discrimination and retaliation were determined to be "untrue."

An adverse action includes any retaliatory act that results in an adverse effect on the terms, benefits or conditions of employment. See *Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001); Munday v. Waste Management of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997),* cert. denied, *522 U.S. 1116, 140 L. Ed. 2d 116, 118 S. Ct. 1053 (1998).* While hiring, discharging, failing to promote and other "ultimate employment decisions" can constitute adverse employment actions, the Fourth Circuit has also explicitly recognized retaliatory harassment as an adverse action in the context of a retaliation claim. See *Von Gunten, 243 F.3d at 864-65* (retaliatory harassment can comprise adverse action "if, but only if, that act or harassment results in an adverse effect **[*49]** on the "terms, conditions, or benefits" of employment"); *Causey v. Balog, 162 F.3d 795, 803 (4th Cir.*

1998) (recognizing retaliatory harassment in context of retaliation claims). Accordingly, the court will construe plaintiffs' hostile work environment claims based on retaliation as claims of retaliatory harassment. n20

n20 Theoretically, a court could consider a claim based on harassment of a retaliatory nature under the hostile work environment framework or under the retaliation framework. Typically, in a hostile work environment case based on sexual or racial harassment, a court examines the totality of the circumstances on a motion for summary judgment and does not apply the McDonnell-Douglas burden-shifting paradigm. See *Copeland v. Rosen, 38 F. Supp.2d 298, 306 (S.D.N.Y. 1999)*("Unlike plaintiff's hostile work environment claim, which on a motion for summary judgment simply involves an assessment of the totality of the circumstances presented, plaintiff's retaliation claim is subject to the more cumbersome three-part, burden-shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).*") The Fourth Circuit has suggested, however, that retaliatory harassment should be considered a form of retaliation rather than a subset of hostile work environment harassment and has subsumed the hostile environment aspect of the inquiry into the traditional retaliation test, thereby requiring the court addressing a retaliatory harassment claim to apply the McDonnell-Douglas burden-shifting paradigm and to allow an employer to provide a

> legitimate explanation for each aspect of its conduct toward the complaining employee. See *Von Gunten, 243 F.3d at 864-66.*

[*50]

To establish a claim of retaliatory harassment within the traditional retaliation framework, a plaintiff employee must prove: that he engaged in protected activity; that he was then subjected to unwelcome harassment sufficiently severe or pervasive to alter his conditions of employment; that the harassment conduct was causally related to the protected activity; and that the harassment was imputable on some factual basis to the employer. See *Fleming v. S.C. Dept. of Corrections, 952 F. Supp. 283, 290 (D.S.C. 1996).* To determine whether alleged conduct is severe and pervasive, a court must consider:

> "... the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Spriggs v. Diamond Auto Glass, 242 F.3d 179, 184 (4th Cir. 2001)(citations omitted).

> Our assessment of whether the alleged conduct is sufficiently severe or pervasive is based on the totality of the circumstances alleged. See *Williams v. General Motors Corp., 187 F.3d 553, 562 (6th*

Cir.1999) (emphasizing **[*51]** totality-of-circumstances review with regard to hostile environment claim). Thus, it is not "whether each incident or harassment standing alone is sufficient to sustain the cause of action in a hostile environment case, but whether--taken together--the reported incidents make out such a case." *Id.* Finally, we approach the question of whether the "constellation of surrounding circumstances, expectations, and relationships" formed a hostile or abusive workplace environment from both an objective and a subjective perspective. See *Williams v. General Motors Corp., 187 F.3d 553, 562 (6th Cir.1999)*; see also *Faragher, 524 U.S. at 788, 118 S. Ct. 2275* (reaffirming the objective and subjective components of the test for a hostile work environment). Thus, we look both to whether a reasonable person in plaintiff's position would find that the conduct at issue constitutes severe or pervasive hostile retaliation *and* whether the plaintiff subjectively perceived the employer's actions to be severe or pervasive retaliation. See *Harris, 510 U.S. at 21* ... "Conduct that is not severe or pervasive enough to create an objectively hostile or **[*52]** abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." *Id.*

Ceckitti v. City of Columbus, Dept. of Public Safety, 14 Fed. Appx. 512, 516, 2001 WL 814935, **3 (6th Cir. July 12, 2001). See also, *Fleming, 952 F. Supp. at 291.*

With respect to more traditional adverse actions and retaliatory harassment, the causation factor of the prima facie case requires a plaintiff to show that the adverse action would not have occurred but for the protected activity. *DeWitt v. Mecklenburg Co., 73 F. Supp.2d 589, 602 (W.D.N.C. 1999).*

A plaintiff may prove retaliation by direct or circumstantial evidence. "'Direct evidence is evidence which, if believed, proves the fact [of [retaliatory] animus] without inference or presumption.'" *Bergene v. Salt River Project Agr. Imp. and Power Dist., 272 F.3d 1136, 1141 (9th Cir. 2001)*(citations omitted). "'In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face.'" *Fierros v. Texas Dept. of Health, 274 F.3d 187, 195 (5th Cir. 2001)* **[*53]** (citation omitted). "If ... [a] plaintiff presents direct evidence that the employer's motivation for the adverse action was at least in part retaliatory, ... 'the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor.'" *Id. at 192* (citation omitted).

In the absence of direct evidence, a plaintiff may rely on circumstantial evidence to establish the prima facie case of retaliation outlined above. If a plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, non-

retaliatory reason for the adverse action. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)*. The defendant has only the burden of production and "need not persuade the court that it was actually motivated by the proffered reasons ... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it [retaliated] against the plaintiff." *Id.* (citation omitted). If the defendant meets this burden of production, the plaintiff must show by a **[*54]** preponderance of the evidence that the proffered reason was pretextual and that the adverse action was motivated by retaliation. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-48, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)*. See *Spillers v. Brooke Co. Bd. of Educ., 24 Fed. Appx. 207, 2002 WL 46830, *1 (4th Cir. Jan. 14, 2002); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998)*(applying *McDonnell-Douglas* burden shifting paradigm in retaliation context). As the Supreme Court explained in Reeves, the "'factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.'" *Reeves, 530 U.S. at 147* (citation omitted).

It appears that the burden-shifting paradigm established in *McDonnell Douglas* also applies to claims of retaliatory harassment. See **[*55]** *Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792-93 (6th Cir. 2000)*(explaining that the McDonnell Douglas burden-

shifting scheme applies to retaliatory harassment claims sought to be proved with circumstantial evidence).

With these principles in mind, the court will consider Williams' various retaliation claims and then turn to the retaliation claims alleged by Reaves.

1. Plaintiff Williams

a. Rtaliation

Considering Williams' transfer to patrol, 20-day suspension, and discharge as discrete instances of retaliation, the court must determine if Williams engaged in protected activity, if the foregoing Departmental actions constituted adverse actions affecting the terms and conditions of his employment, and if the protected activity and the adverse actions were causally related.

i. The April 30 Letter and the Transfer to Patrol

Plaintiff Williams has drawn the court's attention to direct evidence supporting his claims of retaliation based on his letter dated 30 April 1996, which alluded to possible racism in departmental procedures regarding promotions. (Defs.' J.A., Vol. III, Dep. Ex. 102.) In that letter, Williams included the statement **[*56]** tha. "Blacks can't go anywhere in this Department, except Narcotics." (Id.) Williams testified that, after submitting his letter to Captain Chandler, his immediate supervisor, Chandler "threatened to sue

[him] and told [him] that [he] was calling [Chandler] a racist and that [Chandler] was going to take the letter and give it to the Chief the next morning." (Williams Dep. Vol. I at 79.) Pursuant to **Hansen's** orders, Williams was transferred from Narcotics to Patrol on 1 May 1996. (Defs.' J.A., Vol. III, Dep. Ex. 106.)

In a "Memo for the Record" to Chief **Hansen** authored by Captain Chandler in May 1996, "responding to the issues raised by Officer Williams in his letter dated 30 April 1996," (Williams Aff., Ex. D), Chandler stated that he had provided a copy of Williams' April 30 letter to **Hansen** and "since Officer Williams felt that Blacks can only serve in Narcotics, he was transferred to the Field Bureau." (Williams' Aff., Ex. D at 2.) To the front of that memo, it appears that a "post-it" was attached reading as follows: "Is this enough or do you need more! Also take note that Williams only mentions -- Blacks can't go anywhere except Narcotics. He left out Patrol, so we **[*57]** sent him to Patrol!" (Id.) n21

> n21 This is apparently a reference to Officer Sweeney's statement in the context of the February 1996 investigation to the effect that "Blacks can't go anywhere but Narcotics and Patrol." In a memorandum authored by Chief **Hansen** dated 1 May 1996, **Hansen** referred to Williams' statement as a "renewed rumor." (Defs.' J.A., Vol. III, Dep. Ex. 105.)

Also on 1 May 1996, the day that Williams was transferred, Chandler authored an administrative memorandum, which he sent to J. Parks, A. Pollard, D.

Threet and R. Clinkscales, the other African-American officers in Narcotics, stating that the position of investigator within Narcotics was strictly voluntary, that assignments were made based on skills and ability, and that the officers to whom the memo was addressed were to contact him if they believed their current assignments were based on their race. (Williams Aff., Ex. H.) The memo contained the following statement: "*If you wish to stay in your current assignment* AND UNDERSTAND that **[*58]** you were selected for reasons other than your RACE, sign and date this memorandum as provided below." (Williams' Aff., Ex. H; italics added, other emphases in original.) Each officer signed the memo. (Id.)

In an interview conducted by Lt. Bryant on 17 May 1996, Williams asked **Hansen** if he would have been transferred to Patrol if he had not written the April 30 letter. **Hansen** responded, "Not unless your performance indicated it." (Defs.' J.A., Vol. III, Dep. Ex. 112 at 4.) The record is clear that Williams' performance as an officer up until the time he wrote the April 30 letter was quite good and that he had no disciplinary record. (Id., Dep. Ex. 128.) Moreover, **Hansen** stated in a subsequent Step II grievance hearing involving Williams held on 9 July 1996 that his primary concern about the Williams' letter had been the discrimination and racism Williams alleged. n22 (Id., Dep. Ex. 127 at 57.)

> n22 The grievance procedure referenced here pertained to Chief **Hansen's** issuance of a Notice of Consideration of Dismissal to Williams on 18 June 1996.

[*59]

This direct evidence supports Williams' allegation that he was transferred from Narcotics to Patrol, a transfer that he characterized as a demotion, because he raised a race issue. The court concludes that the involuntary transfer from Narcotics to Patrol constituted an adverse action for purposes of Williams' retaliation claim because the transfer resulted in an adverse effect on the terms, benefits, and conditions of Williams' employment. Among other things, the transfer entailed a loss of clothing allowance and Williams' investigator incentive as well as the prestige associated with investigator status. (Williams Aff. P 58.) The transfer also meant that Williams would no longer be eligible for promotions posted only to the investigator units. (Id.) See *Fleming v. South Carolina Dep't of Corrections, 952 F. Supp. 283, 288 (D.S.C. 1996)*(explaining that courts have found transfers to be adverse employment actions even where plaintiffs have been transferred to positions of the same pay and rank where the new positions lacked the prestige or other advantages of the former jobs and that "Title VII does not limit adverse job action to strictly monetary considerations **[*60]** ... One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.") Because the City has not submitted any evidence tending to show that the same decision would have been made in the absence of the forbidden factor, the City's motion for summary judgment with respect to Williams' retaliation claim based on the transfer to Patrol will be denied.

ii. The 20-day suspension

As noted previously, Williams engaged in protected activity when he spoke about discrimination and retaliation in the Department during his own and Sweeney's grievance procedures and during his subsequent interview with Bryant, all of which occurred on 17 May 1996. On 18 June 1996, Chief **Hansen** informed Williams that he was being considered for dismissal based on the alleged untruthfulness of statements he made on 17 May 1996, and ultimately, Williams was suspended for 20 days. A suspension is an adverse action. See *E.E.O.C. v. R&R Ventures, 244 F.3d 334, 341 (4th Cir. 2001)* (discussing suspension as an adverse employment action in context of retaliation case); *Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago, 104 F.3d 1004, 1014 (7th Cir. 1997)* **[*61]** (describing suspension as adverse action). Causation is established for purposes of plaintiff's prima facie case by Chief **Hansen's** direct reference to plaintiff Williams' statements in the June 18 letter and by the proximity between the time Williams engaged in protected activity and the date upon which he was subjected to adverse action. See *Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)* (where appellant's proof of a causal connection between her protected activity and her discharge essentially was that she was fired after her employer became aware that she had filed a discrimination charge, such proof "far from conclusively established the requisite causal connection, [but] certainly satisfied the less onerous burden of making a prima facie case of causality.")

The City asserts that Williams was considered for termination and ultimately suspended for untruthfulness, not for making protected comments about racism in the Department. Specifically, the City states that Williams was untruthful in saying he would provide names of like-minded officers and then refusing to do so; untruthful once again in ascribing to Officer Pollard a statement she did **[*62]** not make; and untruthful a third time on 31 May 1996 when making statements about the dishonesty of Chief **Hansen,** Major Moyd and others in the context of Williams' Step III hearing before City Manager John Smith (regarding the transfer to Patrol). Accordingly, the City has satisfied its burden of producing a "legitimate, nonretaliatory reason" for Williams' suspension. n23

> n23 Primarily because the City's argument and much of the evidence in the record supports such an inference, the court has assumed, for purposes of this summary judgment motion, that Williams was suspended and ultimately fired because Chief **Hansen** concluded that he had lied. Accepting that characterization of the City's reason for suspending and firing Williams, it is appropriate for the court to analyze the City's motion for summary judgment as to William's retaliation claims using the McDonnell Douglas burden-shifting paradigm.

> Other evidence in the record, however, suggests that the suspension and the termination were based upon Williams' inability to substantiate or prove his allegations or upon

the fact that his allegations simply did not turn out to be true. If protected activity includes making statements about discrimination that do not turn out to be true, as long as they are reasonable and made in good faith, taking disciplinary action against an individual based on the fact that a statement did not turn out to be true would appear to violate Title VII. To the extent that the City suggests that Williams was suspended and later fired merely because his allegations could not be substantiated, such a reason could not be considered a "legitimate, nonretaliatory" reason for adverse action against an employee given the scope of Title VII's protections. Moreover, to the extent that internal memoranda indicate that Williams (or, for that matter, Reaves) was suspended or terminated based merely on the fact that the Department could not substantiate his statements, such memoranda would appear to be direct evidence of retaliatory action. When a plaintiff presents direct evidence that a factor made illegal under Title VII played a motivating part in an employment decision, a defendant may avoid a finding of liability only by *proving* by a preponderance of the evidence that it would have made the same decision even if it had not allowed the illegal motive to play such a role. See *Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 553, n.8 (4th Cir. 1999)*(expressly holding that the mixed-motive proof scheme is available to a Title VII plaintiff in order to prove a retaliation claim under § *704* if the plaintiff can establish the necessary evidentiary threshold).

> Because the court concludes that both Williams' and Reaves' claims survive defendant's motion for summary judgment under the *McDonnell-Douglas* burden-shifting paradigm, which is more onerous for plaintiffs, the court will apply that standard here and determine whether plaintiffs are entitled to the more favorable mixed-motives analysis at trial. See *Price Waterhouse v. Hopkins, 490 U.S. 228, 247, n.12, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989)* (explaining that a case need not be "correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court," that plaintiffs often will allege, in the alternative, that their cases are both, and that "at some point in the proceedings ... the District Court must decide whether a particular case involves mixed motives"), superseded by statute as stated in *Wagner v. Dillard Dept. Stores, Inc., 17 Fed. Appx. 141, 2001 WL 967495,* **9 (4th Cir. Aug. 27, 2001). See also *Kubicko, 181 F.3d at 552-53* (explaining that the district court must determine whether the evidentiary threshold for the mixed-motives proof scheme has been met, which "ultimately hinges on the strength of the evidence establishing discrimination," after it has reviewed the evidence).

[*63]

Ordinarily, a court is not required or encouraged to "second guess" an employer's proffered business reason for taking a particular disciplinary action or even for firing an employee. *E.E.O.C. v. Clay*

Printing Co., 955 F.2d 936, 946 (4th Cir. 1992) ("It is not the purpose of the EEOC nor the function of [the] court to second guess the wisdom of business decisions.") An employer's "legitimate, nondiscriminatory reason" for taking a particular action need not be good, fair, wise or even correct, so long as it is the true reason motivating an employer's actions. See *Hawkins v. PepsiCo, Inc., 203 F.3d 274, 279 (4th Cir. 2000)*. Generally, an employee must provide some evidence that the employer did not honestly believe the reasons given for the adverse action or discharge to prevail in establishing that the employer's proffered reason for its actions are pretextual. *Id.* A court's perception that an employer misjudged or engineered the situation leading to the disciplinary action or termination might also be probative in some cases on the issue of pretext, however. See *Burdine, 450 U.S. at 259* (fact that a court may think an employer **[*64]** misjudged the qualifications of applicants may be probative of whether employer's reasons are pretext for discrimination); *Byrnie v. Town of Cromwell, Bd. of Educ, 243 F.3d 93, 105 (2nd Cir. 2001)*("'while the business judgment rule protects the sincere employer against second-guessing of the reasonableness of its judgments, it does not protect the employer against attacks on its credibility'"); *Goosby v. Johnson & Johnson Medical Inc., 228 F.3d 313, 321 (3rd Cir. 2000)* ("Although courts must be careful not to second-guess an employer's business judgment that it makes in good faith, plaintiff must be allowed to show that her employer's asserted reasons for discharging her were a pretext and that the real reason was [illegal discrimination].") There is a distinction between a poor or unwise decision and a reason manufactured to

justify adverse action against an employee against whom an employer wants to retaliate. Thus, facts may exist from which a reasonable jury could conclude that the employer's proffered reason for its conduct is so lacking in merit as to call into question its genuineness. See, e.g., *Dister v. Continental Group, Inc., 859 F.2d 1108, 1116 (2nd Cir. 1988)* **[*65]** ("pretext can be established by a showing that the 'asserted neutral basis was so ridden with error' that the employer obviously could not honestly have relied on it"). The court notes that the administrative records submitted by defendants in this case, and not merely the plaintiffs' personal speculations, give rise to the inference that defendants' offered reasons were manufactured to justify adverse actions against the plaintiffs in this case.

In addition, the "untruthfulness" upon which Chief **Hansen's** decisions were apparently premised with respect to both Williams and Reaves necessarily calls into question the City's motivation in these cases given the context in which the alleged untruthfulness arose. Had Chief **Hansen** disciplined or fired an African-American officer for making a false statement on a resume or falsifying information on a police report, for example, the alleged "untruthfulness" would not be as problematic. n24 Here, Chief **Hansen** and the City have claimed that plaintiffs have lied about racism and discrimination within the Department, the very issue before the court. Allowing the employer to sit in judgment of an employee alleging discrimination and retaliation, **[*66]** to require him to prove the truth of his allegations, to conclude that he is lying and fire him for it, and, in doing so, to prevent that employee from having his case heard in court would be an anomalous

result indeed. This is particularly so in Reaves' case, where Chief **Hansen** and Lt. Bryant explicitly required him to make the allegations in the first place, threatening him with dismissal if he did not comply. (Defs.' J.A., Vol. II, Dep. Ex. 54 at 16, 27.)

> n24 The court notes that the cases cited by the City in its Reply brief pertaining to the importance of honesty for police officers involved instances of dishonesty regarding lying about stealing department gas and taking a subway pass from a young person and destroying it, lying about a workers' compensation claim, and lying in a false claim for overtime. (Reply at 11.) None of the cited cases involved purported lying about the existence of racism and discriminatory practices in a department.

Moreover, to countenance without further inquiry an employer's **[*67]** statement that an employee who complained about racism and discrimination was fired for lying would seem to fly in the face of one of the very purposes of Title VII -- to protect an employee's ability to speak about and oppose discriminatory and retaliatory practices. As the Moyo court explained

> It is not necessary ... that the [opposed] employment practice actually be unlawful; opposition clause protection will be accorded "whenever the opposition is based on a '*reasonable belief*' that the employer has engaged in an unlawful employment practice." ... The

> reasonableness of [a plaintiff's] belief that an unlawful employment practice occurred must be assessed according to an objective standard--one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a *reasonable* mistake may be one of fact or law. We also note that it has been long established that Title VII, as remedial legislation, is construed broadly."

40 F.3d at 985 (citations omitted). Moreover, "an erroneous belief that an employer engaged in an unlawful employment practice **[*68]** is *reasonable,* and thus actionable under *§ 704(a),* if premised on a mistake made in good faith." *Id.*

The evidence in this case does not suggest that defendants even attempted to discern whether plaintiffs had a good faith belief in their allegations or whether their allegations were reasonable -- they sought only to determine whether they were "true." n25 As indicated by the foregoing cases, a plaintiff is entitled to protection under Title VII even if his allegations are untrue, as long as he, in good faith, reasonably believed them to be true.

> n25 The City cites to a portion of Williams' deposition testimony in which Williams tries to explain what he meant when he used the phrase "Blacks can't go anywhere except Narcotics" in support of its argument that Williams has admitted, in the course of this litigation, that his accusations about Blacks

being relegated to Narcotics "were lies, and knowing lies at the time they were made." (Reply at 18.) The court notes Williams' statement that he was speaking figuratively and not literally when he said "Blacks can't go anywhere except Narcotics" and declines to interpret Williams' deposition testimony in the same manner that the City has interpreted it. The court does not conclude that Williams deliberately set forth a knowing lie about racism in the Department in the context of his April 30 letter.

[*69]

Plaintiffs have offered sufficient evidence to raise a genuine issue of material fact as to the pretextual nature of the City's stated reasons for its conduct and to support the inference that the City's suspension of Williams was motivated by retaliatory animus.

iii. Discharge

The court concludes that Williams has also established a prima facie case of retaliatory discharge. He engaged in protected activity by speaking out about discrimination and retaliation in the Department and he was subsequently fired. The causal connection between these two elements presents the more difficult question. The City argues that Williams cannot offer sufficient evidence to permit a jury to find a causal connection between Williams' complaints about alleged race discrimination and retaliation and any

adverse action taken against him. (City's Mem. in Supp. of Summ. J. at 35.) The Fourth Circuit requires a plaintiff to demonstrate a but-for causal connection to establish a Title VII claim. See *Kinney v. Washington Gas and Light Co., 83 F.3d 415, 1996 WL 192144,* **3 (4th Cir. Apr. 22, 1996)(describing causation factor in Title VII retaliation claim as one subject to but-for test); **[*70]** *Arvinger v. Mayor and City Council of Baltimore, 894 F.2d 401, 1990 WL 2198,* **4 (4th Cir. Jan. 12, 1990)(rejecting the view that Title VII has been violated if retaliation for protected activity was merely "in part" a reason for the adverse action and concluding that a plaintiff must show that the adverse action would not have occurred "but for" the protected conduct, a test which "serves the salutary function of directing the factfinder's attention to the predominant reason for an employer's adverse action").

Chief **Hansen** explicitly stated that Williams would be dismissed, not only for making false and misleading statements regarding Chief **Hansen's** reaction to the dog bite incident, but also for his alleged pattern of untruthfulness in grievance hearings held before City Manager John Smith on 31 May 1996 and 13 August 1996; and the fact that Williams had previously been suspended for 20 days for untruthfulness during an internal investigation. (Dep. Exs. 152-53.) While Williams' discharge may not have occurred but-for the dog-bite incident, it could also be argued that his discharge would not have occurred but-for the preceding issues regarding Williams' discussion **[*71]** of and position with respect to racial issues and, moreover, that the dog bite incident itself would not have happened but-for the preceding conflicts between

Williams and **Hansen** regarding his protected speech. The stated grounds for dismissal, explicitly including Williams' alleged "pattern of untruthfulness," (Defs.' J.A., Vol. III, Dep. Ex. 153), make it clear that Williams' conduct and **Hansen's** reaction with respect to the dog bite incident arose out of the strained relationship between Williams and **Hansen,** which in turn resulted from the ongoing investigatory and disciplinary proceedings regarding Williams following his letter of 30 April 1996. The court concludes that evidence in the record, specifically the repeated references to Williams' alleged pattern of untruthfulness contained in the Notice of Consideration for Dismissal and the Notice of Dismissal itself, could support a finding that Williams' statements about discrimination and retaliation in the Department were the predominant reason for Chief **Hansen's** ultimate decision to terminate his employment.

The City asserts that the dog bite incident and Williams' pattern of untruthfulness were legitimate, nonretaliatory reasons **[*72]** for Williams' termination. Thus, the City's argument rests on the theory that Williams' repeated lies, and not the fact that he spoke out about discrimination and retaliation, led to his dismissal. The court must conclude, once again, that the circumstances in which it was determined that the statements Williams made in May and August of 1996 were untrue cast doubt on defendants' credibility, and Williams has raised a genuine issue of material fact as to the pretextual nature of the reasons offered in support of his discharge. Accordingly, defendants' motion for summary judgment as to Williams' retaliatory discharge claim will be denied.

b. Retaliatory Harassment

In addition to analyzing each discrete incident enumerated above as an adverse action for purposes of the traditional retaliation analysis, the court must consider Williams' claim of retaliatory harassment. Williams' harassment claim rests primarily on the Department's numerous and related investigations into Williams' comments about racism within the Department, which were initiated by Chief **Hansen** and carried out by Lt. Bryant of OPS or Williams' supervising officers; the various disciplinary actions taken against **[*73]** Williams, including his ultimate discharge; and the effects of the acrimonious relationship between Chief **Hansen** and Williams that developed over the course of grievance proceedings held in 1996 and 1997.

Making statements about perceived racism, discrimination, or retaliation to one's employer is protected conduct under Title VII. See *42 U.S.C. § 2000e-3(a)*. The court must determine whether Williams has shown that the alleged retaliatory harassment was sufficiently severe and pervasive to alter the conditions of his working environment and whether such harassment may be imputed to his employer. See *Diamond v. U.S. Postal Serv., 29 Fed. Appx. 207, 2002 WL 21995,* **3-4 (6th Cir. Jan. 4, 2002); *Von Gunten, 243 F.3d at 870; Fleming, 952 F. Supp. at 290-91.* If so, the harassment would be considered an adverse action and the court would then consider whether the City has offered legitimate, non-discriminatory, non-retaliatory reasons for each action taken with respect to plaintiff Williams. See *Fleming, 952 F. Supp. at 293.* If it has done

so, the court must go on to consider whether Williams **[*74]** has created an issue of material fact as to the pretextual nature of defendant's proffered motives and as to the retaliatory nature of defendant's conduct. See *Ceckitti, 14 Fed. Appx. at 516, 2001 WL 814935, **2.*

For purposes of this retaliatory harassment claim it is important to take note of the various allegations Williams has made about the Department's conduct which may not, standing alone, rise to the level of adverse employment actions: specifically, Chief **Hansen's** inclination to order investigations of African-American officers who raised issues of perceived discrimination or retaliation; and his further tendency to initiate and carry out detailed, heavily papered investigations of every detail of statements made by officers discussing the existence of discrimination and retaliation in the Department. Likewise, threats to discipline and terminate employees based on alleged failure to comply with orders and threats to terminate employees may not qualify as adverse employment actions but may, nevertheless, contribute to a hostile, retaliatory atmosphere.

The evidence, taken in the light most favorable to Williams shows that, after initiating the grievance process **[*75]** with respect to his transfer, Williams was subject to an intimidating and harassing coercive investigation based on his statements about discrimination within the Department, followed by an additional investigation of the statements that he made in the context of the original investigation. He was served with a Notice of Consideration of Dismissal based on his alleged untruthfulness during the course

of the grievance hearings and the investigations, (Defs.' J.A., Vol. III, Dep. Ex. 152), and ultimately, he was suspended based on those same events. His name was removed from the SRO list, ostensibly based upon the charges lodged against him by Chief **Hansen.** After filing a charge with the EEOC in October 1996 and being involved in additional conflicts with Chief **Hansen,** Williams was discharged in July 1997. The stated reasons for Williams' dismissal were: Williams' allegedly false and misleading statements to the effect that Chief **Hansen** did not speak to him and inquire as to his welfare after he was bitten by a dog in the line of duty at a time when Chief **Hansen's** reputation had been publicly questioned on Williams' behalf by the NAACP and certain City Council members; Williams' alleged **[*76]** untruthfulness in grievance hearings held before City Manager John Smith on 31 May 1996 and 13 August 1996; and the fact that Williams had previously been suspended for 20 days for untruthfulness during an internal investigation. (Id., Dep. Ex. 153.)

As explained above, Williams' discharge arose out of the strained relationship between Williams and **Hansen** which resulted from proceedings with respect to Williams following his letter of 30 April 1996, and the grounds for the discharge explicitly included instances of alleged untruthfulness arising from the race issues raised by Williams. Although the PRB recommended that **Hansen's** decision to fire Williams should be reversed, (Williams Aff. P 133, Ex. O), the City Manager did not reverse the decision, and Williams' employment was terminated. (Defs.' J.A., Vol. III, Dep. Ex. 154.) Considering the totality of the circumstances and the facts in the light most favorable

to Williams, the court concludes that he has shown a severe and pervasive hostile environment in the Department.

The court also finds that the conduct of the City Managers, Chief **Hansen,** Lt. Bryant and Captain Chandler, as well as conduct engaged in at the direction of these **[*77]** individuals, may fairly be attributed to the City for purposes of Title VII. See *Morris, 201 F.3d at 792* (holding retaliatory harassment by a supervisor actionable in Title VII case).

> Where an employee suffers a tangible employment action at the hands of his supervisor (or successively higher authority) as the result of prohibited discrimination, then the employer may be held liable on the premise that the supervisor acted within the scope of his agency. See *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762-63, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).* Tangible employment actions, the Supreme Court has said, "fall within the special province of the supervisor ... [They] are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." ... Hence, "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." ... A "tangible employment action" occurs whenever "a significant change in employment status" is effected, "such as hiring, firing, failing

> to promote, reassignment with significantly different responsibilities, or a decision causing a significant **[*78]** change in benefits."

Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 & n.8 (4th Cir. 2001)(some citations omitted). See also *Fleming, 952 F. Supp. at 290* (where plaintiff alleged that harassing conduct took the form of personnel decisions by various supervisors, an issue of fact existed about whether liability was imputed to employer). Explaining that a requirement in sustaining any hostile work environment claim is that the alleged conduct of the harassing employee be shown to be attributable to the employer, another court has explained that

> determination of whether that obstacle has been overcome generally hinges as a preliminary matter on whether the discriminatory acts were perpetrated by supervisory or non-supervisory employees ... Where a supervisor--someone who acts with the authority and command of the employer vis-a-vis other employees--has been directly involved in the alleged wrongdoing, the supervisor's actions are considered those of the employer and, consequently, the employer is deemed presumptively liable.

Copeland v. Rosen, 38 F. Supp.2d 298, 304 (S.D.N.Y. 1999). Moreover, the City has not **[*79]** relied upon nor proffered any evidence that would support the

affirmative defense to harassment by a supervisor set forth in Faragher and Ellerth. n26 The court therefore concludes that Williams has established a cognizable retaliation claim based on retaliatory harassment.

> n26 As the Supreme Court has explained, an employer does not prevail under Title VII by the fortuity of no tangible employment action having been taken against the complainant, but the standard for imposing liability is made more stringent by the availability of an affirmative defense. See *Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)*. Under Faragher, "the employer may escape liability if it can demonstrate, by a preponderance of the evidence, that (1) it 'exercised reasonable care to prevent and correct promptly any harassing behavior'; and (2) the plaintiff 'unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" *Spriggs, 242 F.3d at 186* (citing *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762-63, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)* and *Faragher, 524 U.S. at 807*). See also *Spriggs, 242 F.3d at 186 n. 9* (agreeing with sister circuits that Faragher and Ellerth apply to the full range of harassment claims covered by Title VII, specifically discussing racial and sexual harassment claims).

[*80]

While the City states that the Department transferred, suspended and discharged Williams based on his untruthfulness and conduct unbecoming an officer, the City has not offered legitimate, nonretaliatory reasons for its incessant and overly zealous investigations of Williams' allegations. The evidence before the court, including the internal memoranda documenting the various phases of the numerous investigations, suggests that the investigations were not undertaken merely to discover whether discrimination existed in the Department and to remedy that discrimination, but rather to put the plaintiffs in the untenable position of proving their perceptions and to put the Department in the position to terminate their employment when and if their statements about discrimination and retaliation did not turn out to be "true." Even if the court assumes that the City has offered a legitimate, nonretaliatory reason for its relatively coercive investigations of plaintiffs, the court is nevertheless constrained to conclude that the record raises genuine issues of material fact regarding the pretextual nature of those reasons and the actual retaliatory nature of the City's conduct. It simply cannot **[*81]** be the case that an employer may be permitted to manufacture a "lie" by subjecting a statement of perceived discrimination to hyper-technical scrutiny and then rest on the "lie" rather than the employee's protected conduct as a basis for the employee's removal. The significant possibility that this is what occurred in the Department renders an award of summary judgment in this case inappropriate.

Defendants' motion for summary judgment on Williams' Title VII claims alleging retaliation, retaliatory discharge, and retaliatory harassment will be denied.

2. Plaintiff Reaves

a. Retaliation

Plaintiff Reaves' retaliation claim, which the court will consider together with his retaliatory discharge claim, is premised primarily on two events: Chief **Hansen's** decision to suspend him based on his initial comments to Captain Shambley and his subsequent responses during the interrogation about his perception of discrimination in the Department conducted by Lt. Bryant in conjunction with Captain Shambley in February 1996; and Chief **Hansen's** decision to terminate Reaves' employment based on the result of the investigation into the Cole and Gillard incidents.

i. The February 1996 Interrogation **[*82]**

Plaintiff Reaves engaged in a protected activity when he discussed his perceptions of discrimination in the Department with Shambley on 26 February 1996 at the Department's request and again when he was compelled to reiterate those perceptions in an interview with Shambley and Bryant. Further, Reaves was subject to adverse action when he was subjected to disciplinary action, i.e., suspension. While Reaves argues that his suspension was caused by his protected activity, the City argues that the Department sought to

remove Reaves and ultimately suspended him during the summer of 1996 because Reaves' allegations of discrimination were "false," not merely because he spoke about discrimination. Reaves' alleged untruthfulness is also the ostensibly legitimate, nonretaliatory reason offered as the basis for the Department's actions.

The court concludes, however, that the attempted termination and the eventual suspension were causally related to Reaves' protected activity because Reaves was essentially disciplined because, in some instances, he could not provide evidence to support his perceptions of discrimination and, in others, because the Department believed another officer who provided **[*83]** information contrary to that provided by Reaves. As with Williams, the process the Department chose to employ in its investigation of Reaves' comments compromises its credibility.

Among other things, Reaves expressed his belief that the suspension and probation imposed on him in late 1995 resulted from race discrimination in the Department. (Defs.' J.A., Vol. II, Dep. Ex. 54 at 2.) Reaves told Lt. Bryant that during the investigation of Officer Lowe's allegations the previous Fall he had requested that he be allowed to take a polygraph test and that he had been denied the opportunity to do so because the investigating officer told Reaves that he believed Lowe. (Id. at 2, 22.) Reaves also mentioned as examples of discrimination his being assigned to older model cars, being denied training on Motor Data Terminals (MDTs) contained in the newer model cars, and being denied adequate time to train for a position

in the motorcycle unit. (Defs.' J.A., Vol. II, Dep. Ex. 54 at 4, 5, 19, 20.) In internal investigative memoranda, the Department noted a number of reasons why Reaves' perceptions simply were not true. (Reaves Aff., Ex. T; (Defs.' J.A., Vol. II, Dep. Ex. 46.) With respect to the **[*84]** motorcycle unit in particular, Reaves alleges that the Department specifically requested that he join the motorcycle unit, (Reaves Aff. P 22), that he made clear his lack of experience, (id. P 23), and that he was assured he would have ample time to train, (id. P 24). Subsequently, he was provided only the regular amount of time to train, (id. P 25), and then he was denied a position with the unit because he "dropped the motorcycle 49 times in two hours and scored 11 out of a minimum of 84 after 40 hours of training." (Defs.' J.A. Vol. II, Dep. Ex. 46.) He perceived the atmosphere as racially hostile. (Reaves Aff. P 28.)

In his February 1996 interview, Reaves also stated that he believed Officers Jernigan and Trepanier were racists explaining that, among other things, they did not speak to him. n27 According to the Department, Reaves' statement was "vexatious and unnecessary" because he did not provide evidence to support his statement. (Defs.' J.A., Vol. II, Dep. Ex. 50.) He also allegedly told an officer in training that Officer Trepanier "did not like black people." (Id.) The Department relied on a statement from the officer in training to prove this allegation against Reaves. **[*85]** (Id., Dep. Ex. 46.) Reaves also asserted that Officer Trepanier had failed to back him up on one occasion. (Id., Dep. Ex. 54 at 32.) The subsequent investigation demonstrated that Trepanier did arrive, but that she arrived late. Because she did in fact arrive, **Hansen**

concluded that Reaves' statement that she "never arrived" was a "lie." (Id., Dep. Ex. 50 at 1.) Reaves later acknowledged that Trepanier did eventually arrive to back him up, (Reaves Aff. PP 100, 101), but still maintained that he meant that she did not arrive in a timely manner and that the situation was a dangerous one. (Id.; Reaves Dep. at 123.)

n27 The exchange from the interview proceeded as follows:

> Bryant: Is there anybody you can point to who you feel is a racist?
> Reaves: Yeah. Officer Trepanier, I will say that for the record. Point blank. Her and Jernigan, both. For no unknown reason, yes, will say that.
> Bryant: Have you heard any comments?
> Reaves: Nope. You asked me if I feel, you didn't say hear. If I feel? Yes. Those two, absolutely.
> Bryant: What makes you feel that way?
> Reaves: Because of the comments and the way they treat me as an officer. I will speak to both of them, good morning, how you doing, they won't say a word ...
> (Defs.' J.A., Vol. II, Dep. Ex. 54 at 31-32.)

[*86]

In response to Bryant's question about other officers' feelings about discrimination, Reaves stated that Officer Hall felt he had been discriminated against by his superiors. (Defs.' J.A., Vol. II, Dep. Ex. 54 at 28.)

The Department concluded Reaves had been untruthful when Hall denied making such a statement upon direct examination by his superiors and OPS. (Defs.' J.A., Vol. II, Dep. Ex. 50.) The Department also considered it a violation of the rule regarding truthfulness and cooperation that Reaves refused to answer when requested to provide names of other officers who stated that they had been discriminated against. (Id.)

Once again, the City's argument that Reaves was fired for untruthfulness calls into question its credibility given the subject matter at issue and the surrounding circumstances. A statement that a person perceives another individual's conduct as discriminatory simply cannot be characterized as a "lie." Rather, a statement that a person perceives another's conduct as discriminatory is intensely personal and the presence or absence of discrimination depends on many complex factors. In fact, one person could perceive discrimination and another deny its existence [*87] based on the same set of purportedly objective "facts." Under Title VII, courts do not typically conclude that discrimination does not exist -- instead, courts conclude that plaintiffs have or have not set forth a case that is actionable under Title VII.

Defendants argue that the facts underlying Reaves' claims, and not just his perceptions, were untrue, and therefore support the conclusion that Reaves lied. As noted above in the discussion of Williams' claims, Title VII protects speech regarding race discrimination and retaliation even when such discrimination did not necessarily occur as long as the

complainant had a reasonable good faith belief that it did occur. See *Hooven-Lewis, 249 F.3d 273*. This court is therefore reluctant to conclude that Reaves' claim does not survive summary judgment given the Department's stated reasons for its actions with respect to Reaves. Moreover, the court is struck by the fact that the truth or falsity of these statements would simply not be an issue if the Department had not compelled Reaves to make a detailed statement about discrimination in the first place. The City's motion will be denied with respect to Reaves' suspension. **[*88]**

ii. Reaves' Termination

On 2 October 1996, Reaves filed a charge of retaliation against the City with the EEOC. (Defs.' J.A., Vol. II, Dep. Ex. 3.) This filing of charges with the EEOC constitutes protected activity, and his termination three months later constitutes an adverse action. The City argues that Reaves was fired based on his untruthfulness regarding the Cole and Gillard incidents. However, Reaves has submitted evidence supporting the inference that the Department's investigation of the Cole and Gillard incidents was motivated by its desire to retaliate against Reaves and to find a basis to terminate Reaves' employment after its initial attempt to fire him was unsuccessful. Among other things, the Cole and Gillard investigations took place one year and six months after the incidents, respectively, but at approximately the same time as Reaves' grievance procedure.

The City's motion for summary judgment with respect to Reaves' retaliatory discharge claim will be denied.

b. Retaliatory Harassment

The suspension and termination, as isolated adverse actions, are, in the context of the retaliatory harassment claim, augmented by other departmental conduct that does **[*89]** not necessarily rise to the level of adverse activity standing alone. The original February 1996 investigation during which Reaves was compelled to discuss his perceptions of discrimination in the Department, the investigation into the minutiae of the comments Reaves made during his initial interviews, the post-suspension assignment to administrative duty and the requirement that Reaves shovel rocks, and the investigation into dated incidents that the original claimants had not bothered to pursue in a timely manner, all contributed to a severe and pervasive hostile atmosphere in the Department. Based on the incidents involving Reaves that occurred between February 1996 and January 1997, the law regarding retaliatory harassment, and the court's discussion of pretext in the context of Williams' claims, the court concludes that Reaves' retaliatory harassment claim also survives the City's summary judgment motion.

III. § *1983* Claims Against the City

Reaves and Williams have both asserted claims under *42 U.S.C. § 1983* alleging that the City violated their equal protection and due process rights under the *Fourteenth Amendment* as well as their *First Amendment* **[*90]** rights.

A. Relationship between 1983 and Title VII Claims

As a preliminary matter, the City argues that plaintiffs' *§ 1983* equal protection and due process claims are, at bottom, claims based on alleged retaliation that could have been brought under Title VII. (City's Reply at 9.) The fact that claims could be (and in fact have been) brought under Title VII, n28 however, is not dispositive of their validity under *§ 1983*. To the extent that the City argues that plaintiffs' *§ 1983* claims are barred because Title VII is the exclusive remedy for employment discrimination in the public sector, the court rejects defendant's argument. See *Rosenbaum v. Board of Trustees of Montgomery Comm. College, 173 F.3d 851, 1999 WL 182358,* **3 (4th Cir. Mar. 19, 1999)(where plaintiff raised the same allegations under *42 U.S.C. § 1983* that he raised under Title VII, court explained that its analysis with respect to Title VII governed those claims, that Title VII is not an exclusive remedy for employment discrimination by a public entity, and that a state employee may still bring a *Fourteenth Amendment* claim under *42 U.S.C. § 1983* **[*91]** to challenge discriminatory employment decisions); *Beardsley v. Webb, 30 F.3d 524, 526-27 (4th Cir. 1994)*("In light of appellate case law that Title VII and *§*

1983 co-exist to afford relief for employment discrimination, it is quite unlikely that Congress implicitly intended the 1991 Act to bar claimants from seeking relief under § *1983*. It is more reasonable to presume that Congress intended both avenues of relief to remain open.")

> n28 To the extent that City has argued that plaintiff Williams' § *1983* claims are barred because he attempted to circumvent Title VII's administrative prerequisites for suit, (City's Reply at 9), the court finds that plaintiff Williams followed the required procedures with respect to the EEOC and has not attempted to circumvent Title VII's administrative prerequisites. Because Williams has merely asserted § *1983* claims in addition to his Title VII claims, the court must conclude that his claims are not subject to dismissal under *Hughes v. Bedsole, 48 F.3d 1376, 1383, n. 6 (4th Cir. 1995)*.

[*92]

B. Substantive and Procedural Due Process

"While it is not a source of substantive rights, *section 1983* provides a method for vindicating federal rights conferred by the Constitution and federal statutes." *Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989, 997 (11th Cir. 1990)*(citations omitted). In order to prevail in a civil rights action under § *1983*, "'a plaintiff must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or

laws of the United States, and (2) that the act or omission was done by a person acting under color of law.'" *Id. at 996* (citations omitted). See also *Avery v. Burke County, 660 F.2d 111, 115 (4th Cir. 1981)* (citation omitted).

Plaintiffs claim that the City violated their due process rights. (See Williams' Am. Compl. P 28). The court concludes, based on a careful reading of plaintiffs' complaints, that they have not alleged a violation of their procedural due process rights, but rather have alleged violations of their rights to substantive due process. Both plaintiffs' due process claims appear **[*93]** to be based on their assertions that the Department subjected them to numerous investigations in an effort to chill the free expression of the African-American officers who voiced opposition to discrimination. (See Reaves Mem. at 33.)

> To succeed on its substantive due process claim, [a plaintiff] must show that (1) it has a liberty or property interest; (2) the state deprived it of this liberty or property interest; and (3) the state's action falls "so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency."

Safety-Kleen, Inc., (Pinewood) v. Wyche, 274 F.3d 846, 862, 2001 WL 1627624, **8 (4th Cir. Dec. 19, 2001)(citing *Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995)).* The Supreme Court has held that a cause of action cannot be based in substantive due process where a more specific constitutional provision is

applicable. See *Albright v. Oliver, 510 U.S. 266, 273, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994)* ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, **[*94]** 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" (quoting *Graham v. Connor, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)*)). See also *Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891, 900 (6th Cir. 2001)*. Any claim for a violation of plaintiffs' substantive due process right to free speech is therefore duplicative of plaintiffs' *First Amendment* claims. Accordingly, defendants' motion for summary judgment with respect to plaintiffs' *§ 1983* claims asserting the violation of their substantive due process rights will be allowed, and those claims will be dismissed. Plaintiffs' allegations regarding defendants' abrogation of their freedom of expression will be treated below in the context of their *First Amendment* claims.

C. Overarching Policy and Custom Issues Regarding Remainder of Plaintiffs' *§ 1983* Claims

Plaintiffs' other claims against the City and the various City officials named as defendants assert that defendants' conduct toward them with respect to the investigation of discrimination in the Department and the subsequent disciplinary action imposed **[*95]** upon them violated their rights under the First and *Fourteenth Amendments*. Specifically, plaintiffs argue that the City, through its City Council members, officials and employees, has maintained a persistent widespread custom or policy of retaliating against its

employees who oppose discriminatory practices. (Williams Am. Compl. P 22.)

As the Supreme Court held in *Monell v. Department of Social Servs. of City of NY, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978),*

> [a] local government may not be sued under § *1983* for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § *1983*."

Id.

The Fourth Circuit has recognized that such policy may be found in "'certain affirmative decisions of individual policymaking officials, or in certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens,'" *Austin v. Paramount Parks, Inc., 195 F.3d 715, 727 (4th Cir. 1999)* **[*96]** (citing *Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999)*), and in "formal or informal ad hoc policy choices or decisions of municipal officials authorized to make and implement municipal policy," *Spell v. McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987)*, cert. denied, *484 U.S. 1027 (1988)*. The question remains, however, what is "policy." The Spell court reasoned that

> "policy" in this context implies most obviously and narrowly a "course of action consciously chosen from among various alternatives" respecting basic governmental functions, as opposed to episodic exercises of discretion in the operational details of government.

Id. (citations omitted). The court concludes that, even assuming that Chief **Hansen** and the various City Managers involved could be considered policymakers, plaintiffs have not offered evidence tending to show the existence of a City policy of retaliating against employees who oppose discriminatory practices. See *id.* (municipal liability results only when the policy is the moving force behind the particular constitutional violation).

The Spell court explained, however, that official **[*97]** policy in "the relatively narrow sense of discrete, consciously chosen courses of action by 'policymakers' is not the only basis for imposing municipal liability," *id.*, but that "custom or usage" may also provide the basis for such liability. The existence of such custom or usage "may be found in 'persistent and widespread ... practices of [municipal] officials [which] although not authorized by written law, [are] so permanent and well-settled as to [have] the force of law.'" *Id.*; *Austin, 195 F.3d at 727.* Where the duration and frequency of the practices at issue "warrant[] a finding of either actual or constructive knowledge by the municipal governing body that the practices have become customary among its employees," custom and usage

may be fairly attributable to the municipality. *Spell, 824 F.2d at 1387.*

> [A] developed "custom or usage" may ... become the basis of municipal liability, but only if its continued existence can be laid to the fault of municipal policymakers, and a sufficient causal connection between the "municipal custom or usage" and the specific violation can then be established ... Municipal fault for allowing **[*98]** such a developed "custom or usage" to continue requires (1) actual or constructive knowledge of its existence by responsible policymakers, and (2) their failure, as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practices. Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these. The inculpating knowledge, whether actual or constructive, may be either that of the municipal governing body itself, or of municipal officials having final policymaking authority in municipal law enforcement matters. A sufficiently close causal link between such a known but uncorrected custom or usage and a specific violation is established if

> occurrence of the specific violation was made reasonably probable by permitted continuation of the custom. Again, as in the case of deficient training policy, failure to correct the known practices must be such as to make the specific violation "almost bound to happen, sooner or later," rather than merely "likely to happen in the long run."

Id. at 1391. **[*99]** The Spell court also pointed out that "fault for a violation resulting from condoned custom can only be ascribed when a pattern of comparable practices has become actually or constructively known to responsible policymakers ...." *Id. at 1391.*

The argument that the City's practices have assumed the quality of custom or usage is compelling. Chief **Hansen** is a municipal employee subject to the control and supervision of the City Manager and City Council. Plaintiffs have submitted evidence tending to show that Chief **Hansen** persistently, during 1996 and 1997, subjected African-American officers to probing and mandatory investigations of discrimination issues and further subjected those who commented about discrimination or retaliation in the Department to intense and not necessarily even-handed investigations. As alleged by plaintiffs, Chief **Hansen's** internal investigation procedures and subsequent disciplinary conduct inevitably operated to chill speech. Evidence offered by plaintiffs also tends to show that, acting pursuant to his authority to govern and establish conduct within the Department and acting in concert with other command officers such as

Lt. Bryant, to **[*100]** whom he had delegated the requisite authority, Chief **Hansen** established a protocol of investigation regarding racial complaints.

The continued existence of the custom or usage established by Chief **Hansen** can be laid to the fault of the City if the City had actual or constructive knowledge of its existence and failed, as a matter of specific intent or deliberate indifference, to correct or stop the practices. The evidence pertaining to the involvement of the City Managers and City Council in the Reaves and Williams cases suggests that the City did have actual or constructive knowledge of Chief **Hansen's** practices. The various City Managers had been delegated responsibility for oversight of the Department and also acted as final arbiters of employment-related grievances within the Department. (Stancil Aff. PP 6-8, 16; Smith Aff. P 3.) In that capacity, the City Managers routinely reviewed Chief **Hansen's** disciplinary decisions, including plaintiffs' grievances. (Stancil Aff. PP 14-16.) Williams' grievances regarding his transfer and suspension were before City Manager John Smith on 31 May 1996, (Defs.' J.A., Vol. III, Dep. Ex. 121), and 13 August 1996, (Williams Aff. P 96), and his grievance **[*101]** regarding his termination was before City Manager Ron Rabun following his 22 October 1997 PRB hearing. Reaves' grievances were before City Manager John Smith on 13 September 1996 following his 23 August 1996 PRB hearing n29 and on 8 January 1997 following his 2 January 1997 PRB hearing. (Defs.' J.A., Vol. II, Dep. Exs. 45, 62.) The same pattern of conduct on the part of the Department was evident in both plaintiffs' proceedings. These proceedings certainly give rise to

the inference that the City, by way of the City Managers, had actual or constructive knowledge of Chief **Hansen's** approach to the investigation of African-American officers and their discrimination and retaliation claims. Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them. Arguably then, the City may be said to have condoned the custom established by Chief **Hansen,** failing, as a matter of specific intent or deliberate indifference, to correct or stop the practices.

> n29 Smith presided over Reaves' Step III hearing the day after he had his first meeting with the NAACP regarding discriminatory practices in the Department.

[*102]

As noted above, actual knowledge may be evidenced by recorded reports to or discussions by a municipal governing body. In September 1996, representatives of the NAACP met twice with defendants John Smith and Roger Stancil, City Manager and Deputy City Manager respectively, along with Chief **Hansen,** to discuss discriminatory practices within the Department. In December 1996, the NAACP presented the cases of Officers Reaves, Williams, and Sweeney to the City Council and specifically requested that an independent study be undertaken by a third party to review the actions of the Department. (Torrey Aff. P 6.) The request divided the Council members and generated significant controversy in the city and

among city officials. (Reaves Aff., Ex. U.) City Manager John Smith's contract was apparently terminated based in part on the controversy surrounding the proposed investigation of the Department and the conflict among the Council members on that issue. (Stancil Aff., Ex. 1; Reaves Aff., Ex. U.) Ultimately the City Council did commission a report, and the investigative report completed by Cheryl Grant indicated that the Department had employed questionable investigatory procedures. (Defs. **[*103]** ' J.A., Vol. II, Dep. Ex. 13 at 14A.) Plaintiffs have alleged that the City did not adequately address the problems identified by the report and that the retaliatory practices continued after the report was submitted.

Because the evidence construed in the light most favorable to plaintiffs supports the existence of a custom or usage underlying the alleged deprivation of plaintiffs' constitutional rights, the court will go on to analyze whether plaintiffs have come forward with sufficient evidence showing constitutional violations actionable under *§ 1983*.

D. Equal Protection

1. Racial Discrimination and Harassment

Plaintiffs have asserted that Chief **Hansen's** decision in February 1996 to interview only the African-American officers in the Department with respect to their perceptions of discrimination constituted race discrimination and violated their rights to equal protection. n30

n30 The court rejects plaintiffs' related argument that Chief **Hansen's** decision to subject those African-American officers who commented upon the existence of discrimination in the Department to further investigation by OPS constituted a violation of their equal protection rights because those officers were treated differently than those officers who did not identify any discriminatory practices in the Department.

[*104]

In this portion of the Order, the court is considering only the City's potential liability for the violations of plaintiffs' equal protection rights. Because the City is subject to liability under *§ 1983* only for its own conduct, and because there is no evidence before the court that would support a conclusion that the City had actual or constructive knowledge of Chief **Hansen's** investigatory practices in or before February 1996, the court will award summary judgment to the City on plaintiffs' *§ 1983* claims based on Chief **Hansen's** alleged violations of plaintiffs' rights to equal protection in the course of the February 1996 investigations.

2. Retaliation

To the extent plaintiffs are attempting to assert a *§ 1983* claim under the *equal protection clause* based on retaliation, the court must conclude that such a cause of action is not cognizable. See *Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999)*(noting that

plaintiff's equal protection claim was best characterized as a mere rewording of his *First Amendment* retaliation claim and citing *Watkins v. Bowden, 105 F.3d 1344, 1354 (11th Cir.1997)* for proposition that, in any event, **[*105]** a "pure or generic retaliation claim, ... simply does not implicate the *Equal Protection Clause*.") The City's motion for summary judgment will therefore be allowed with respect to any such claims.

E. *First Amendment*

> For a public employee to state a claim for retaliation under the *First Amendment* (1) the employee must speak as a citizen on a matter of public concern, (2) the employee's interest in speaking on the matter must outweigh the government's interest in providing effective and efficient services to the public, (3) the employee must be "adversely affected" by the alleged retaliation in a manner that "tended to chill his ... *First Amendment* rights" and (4) the speech must be a "substantial factor in the decision to take the allegedly [adverse] retaliatory action." *Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 351-52 (4th Cir. 2000).*
>
> Ascertaining whether a matter is of public concern requires examination of the "content, form, and context" of the statement. *Connick v. Myers, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684* ... (1983); *Goldstein, 218 F.3d at 352.*

> Although internal employment **[*106]** matters are not matters of public concern, see *Goldstein, 218 F.3d at 352,* statements to the public, like those at issue here, involving purported fraud and racial discrimination in a law enforcement agency, indisputably do constitute matters of public concern. See *id. at 353* (statements regarding public safety are "quintessential matters of public concern"); *Robinson v. Balog, 160 F.3d 183, 188 (4th Cir.1998)* (speech seeking to bring to light "actual or potential wrongdoing or breach of public trust" is speech on a matter of public concern); *Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir.1996)* (allegations of racial discrimination within law enforcement agency are matters of "serious public import").

Cutts v. Peed, 17 Fed. Appx. 132, 135, 2001 WL 963728, **1 (4th Cir. Aug. 24, 2001).

Plaintiffs, as public employees, have not given up their rights to free speech, but their rights are, nevertheless, somewhat circumscribed by the public nature of their employment.

> The Supreme Court has established a "balancing" test for resolution of the competing interests. "The problem in any case is **[*107]** to arrive at a balance between the interests of the (employee), as a citizen, in commenting upon matters

> of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Fracaro v. Priddy, 514 F. Supp. 191, 194 (M.D.N.C. 1981)(quoting *Pickering v. Board of Education, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)).* This balancing test is taken into account as the second factor in the *First Amendment* analysis.

> Relevant factors in the balancing test include the public interest in the speech; whether the speech impaired discipline by superiors, harmony among co-workers, or the performance of the speaker's duties; whether the speech had a detrimental impact on close working relationships for which personal confidence and loyalty are necessary; and the time, place, and manner of the speech.

Sanders v. District of Columbia, 16 F. Supp.2d 10, 13 (D. D.C. 1998)(citing *Rankin v. McPherson, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987)).*

With respect to the third element of the test regarding **[*108]** the adverse effect of the alleged retaliation, the Fourth Circuit has

> defined the requisite adversity as "some impairment of the plaintiff's rights," *id.*, and has not endeavored to provide an exhaustive list of sufficiently adverse actions in the context of retaliation for the exercise of *First Amendment* rights. Of course, "not every restriction is sufficient to chill the exercise of *First Amendment* rights [.]" *DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir.1995)*. We note, however, that something less onerous than an "adverse employment action" in the context of Title VII jurisprudence may so chill the exercise of constitutional rights as to constitute a showing of adversity in a *First Amendment* retaliation case under *§ 1983* ... The dispositive inquiry is whether the adverse actions complained of, under the particular circumstances of the case, would deter the employee from again exercising his constitutional right to publicly comment on matters of public concern.

Saleh v. Upadhyay, 11 Fed. Appx. 241, 255, 2001 WL 585085, **9 (4th Cir. May 31, 2001)(some citations omitted).

With respect to the "substantial factor" aspect of **[*109]** the test, the Fourth Circuit has explained that

> by its decisions in the Mt. Healthy and Givhan cases, the Supreme Court has allocated the burden of proof regarding causation between the parties in a *first amendment* discharge case in the following manner. The initial burden lies with the plaintiff, who must show that his protected expression was a "substantial" or "motivating" factor in the employer's decision to terminate him ... If the plaintiff successfully makes that showing, the defendant still may avoid liability if he can show, by a preponderance of the evidence, that the decision to terminate the plaintiff would have been made even in the absence of the protected expression, more simply, the protected speech was not the but for cause of the termination.

Wagner v. Wheeler, 13 F.3d 86, 90 (4th Cir. 1993)(citing *Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979)* and *Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)).*

1. Plaintiff Williams

a. Williams' April 30 Letter and the Ensuing Grievance Proceedings **[*110]**

The City is correct that Williams' statement pertaining to discrimination in the Department was initially made in the context of a letter specifically

addressing Williams' disappointment with the promotion process pertaining to his application for the Homicide Investigator position, and thus cannot readily be characterized as a matter of public concern. n31 However, in the context of the grievance proceeding initiated because of Chief **Hansen's** decision to transfer him to Patrol after he wrote the foregoing letter, and later in the context of Sweeney's grievance proceeding, a proceeding which was unrelated to his own employment issues, Williams stated that other African-Americans probably felt that discrimination, intimidation and retaliation existed in the Department. Williams' very presence at Sweeney's grievance proceeding points to the conclusion that Williams was not simply a disgruntled employee concerned about his own employment dispute. Rather, his actions and speech indicate concern with departmental practices that could be perceived as discriminatory and retaliatory. The court must also take account of the fact that Williams made the statements at issue with knowledge of **[*111]** the actions taken with respect to both he and Officer Sweeney as well as the investigation initiated by Chief **Hansen** in February of that year and the Department's conduct toward those who spoke up about racism in the Department in that context. Williams went on to make additional comments about race and retaliation in the context of the OPS investigation that began on 17 May 1996, and in his 31 May 1996 Step III hearing regarding the letter incident, which comments led to Chief **Hansen's** eventual attempt to terminate his employment and his 20-day suspension.

> n31 The court rejects defendants' argument that characterizing Williams' April 30 letter as a statement of an employee grievance causes "the rest of [his case to collapse] like a house of cards." (Reply at 17.)

In *Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir. 1996)*, the Fourth Circuit explained that allegations of racial discrimination within a law enforcement agency are matters of "serious public import." As the Fourth Circuit has also **[*112]** explained, "speech on matters of public concern is protected even though it occurs in a private setting." *Maciariello v. Sumner, 973 F.2d 295, 299 (4th Cir. 1992)*, cert. denied, *506 U.S. 1080 (1993)*. Examining the content, form, and context of Williams' speech about the existence of racial discrimination, intimidation and retaliation in the course of his grievance proceedings and, more particularly in the course of Sweeney's grievance proceeding, the court must conclude that Williams spoke on a matter of public concern.

With respect to the Pickering balancing test, the court must consider

> "the nature of the employee's job ... [and the] possible effect of his action on employee morale, discipline or efficiency." *Jurgensen, 745 F.2d at 880*. In this regard, the court must evaluate the employer's interest in maintaining efficiency, integrity and discipline. This interest is viewed as if on a spectrum "from university professors at one end to

> policemen at the other." *Id.* Police are at the restricted end of the spectrum because they are "paramilitary"-- discipline is demanded, and freedom must be correspondingly denied.

[*113]

Maciariello, 973 F.2d at 300. Moreover, when the court engages in the Pickering balancing test, the court does not require "the public employer to prove that the employee's speech actually disrupted efficiency, but only that an adverse effect was "reasonably to be apprehended." *Id.* (citing *Jurgensen v. Fairfax Co., 745 F.2d 868, 879 (4th Cir. 1984).*) Certainly, the Department may claim an interest in eliminating baseless claims of racial discrimination and that such claims of discrimination within the Department could disrupt efficiency and cause dissension. A case in point could be Captain Chandler's hostile response to the letter authored by Williams described above. However, Williams' grievance hearing, Officer Sweeney's grievance hearing, and the subsequent OPS investigation were contexts in which the existence of discrimination in the Department was specifically at issue. Accordingly, Williams' speech on the topic was perfectly appropriate, if not to be expected. Given the context in which the statements were made, the court concludes that Williams' interest in speaking on the matter outweighed and arguably did not affect the government's **[*114]** interest in providing effective and efficient services to the public.

After making the statement regarding discrimination and retaliation within the Department during Sweeney's hearing, Williams was immediately subjected to an investigation conducted by OPS during which he was ordered to provide names of African-American officers who believed that discrimination, intimidation and retaliation existed in the Department. When he refused he was read Garrity warnings, n32 and when he finally provided a name and general comment, the Department subjected his statement to hyper-technical scrutiny to conclude that he was "lying." The transcripts from the various hearings that made up the investigation into Williams' statement illustrate that the investigation could not be characterized as one undertaken with concern and sensitivity but rather as defensive and domineering. n33 Moreover, the alleged "untruth" regarding Pollard's statement was referred to repeatedly in future disciplinary proceedings and in the letter providing Williams with notice of his termination. The facts as alleged by plaintiff Williams, who was present in the interviews, demonstrate that he was "adversely affected" by **[*115]** the alleged retaliation in a manner that "tended to chill his ... *First Amendment* rights." There is no question that **Hansen** and Bryant initiated and conducted the investigation of Williams' comments because Williams suggested that other African-Americans probably believed that discrimination, intimidation and retaliation existed in the Department, and therefore Williams' speech was a "substantial factor in the decision to take the allegedly [adverse] retaliatory action."

n32 Williams was subjected to investigation based on his statement in the Sweeney hearing, an action which could be considered adverse in that it would deter him from again exercising his constitutional right to publicly comment on matters of public concern. Almost simultaneously, he was forced, under threat of discipline, to provide names of fellow officers concerned about discrimination and thus was compelled to speak. After speaking under duress, the information he provided was itself subject to investigation and the results of that investigation were later used against Williams.

n33 While the court accepts defendants' point that the court cannot accept Williams' self-interested statements in his affidavit as "evidence" of the intent of Chief **Hansen** and Lt. Bryant with respect to Williams' interrogation, the court can, nevertheless, read the transcripts of the recorded interview between Williams and Bryant, at which **Hansen** made an appearance, and the transcript and notes of the meeting with Pollard, and draw obvious inferences about the nature of the investigation at issue.

[*116]

As noted above, the City's liability under *§ 1983* must be premised on its own conduct, i.e., its actual or constructive knowledge of the existence of the custom or usage established by Chief **Hansen** and its specific intent or deliberate indifference to correct or stop the

practices. While it is unclear what City officials may or may not have known as of 31 May 1996, the date of Williams' first Step III grievance hearing with the City Manager, plaintiffs have submitted sufficient evidence to create a genuine issue of material fact as to the City's knowledge of Chief **Hansen's** investigatory practices as of August 1996, and therefore, claims based on Williams' statements made by Williams in Sweeney's grievance proceeding and in the subsequent OPS investigation, on the Department's reaction to those statements, and on Williams' suspension survive summary judgment.

b. Williams' Speech Related to his Termination

Williams' 10 July 1997 proposed termination was apparently instigated by the dog bite incident. Before he was fired, Williams made numerous comments to fellow officers about Chief **Hansen's** alleged failure to talk to him after he was bitten by the dog. Williams' speech on the **[*117]** dog-bite issue itself does not rise to the level of a public concern. However, Williams' termination was premised, not only on Williams' conduct with respect to the dog bite incident, but also upon Williams' earlier protected speech. The Notice of Consideration of Dismissal as well as the termination letter provided to Williams reference Williams' alleged pattern of untruthfulness and specifically note Williams' comments at hearings before John Smith on 31 May 1996 and 13 August 1996, as well as his suspension resulting from alleged untruthfulness during the internal investigations following Sweeney's grievance hearing. (Defs.' J.A., Vol. III, Dep. Exs. 152, 153.) Based on the letter and the evidence surrounding

the investigatory process discussed above in the context of Williams' Title VII claim, Williams has raised a genuine issue of material fact that his speech played a substantial or motivating factor in **Hansen's** decision to terminate his employment. The City has not, at this juncture, shown that the Department would have taken the same action regarding the dog-bite incident in the absence of the speech-related issues. See *Wagner, 13 F.3d at 90.* Indeed, given **[*118]** the circumstances, the dog bite incident seems inextricably intertwined with Williams' protected speech.

Williams grieved his discharge all the way to the Step III hearing before the City Manager, and there is no question, based on the evidence before the court, that the City was aware of the challenged practices in the Department by the summer of 1997. Accordingly, the City is not entitled to summary judgment with respect to Williams' *First Amendment* claim based on his discharge.

2. Plaintiff Reaves

Like Williams, Reaves spoke on the issue of perceived discrimination within the Department. Moreover, Reaves was compelled to do so. The City maintains that Reaves' speech was not on a matter of public concern and that his complaints about discrimination in the Department related solely to his own employment. Because Shambley and Bryant conducted investigatory interviews at the specific direction of Chief **Hansen** with the stated intent of learning about discrimination in the Department, the court must conclude that Reaves' speech was a matter

of public concern. While some of his comments pertained to his own employment, Reaves also made some comments with respect to the few African-American **[*119]** officers in the Major Crimes Investigation Division and the OPS, the impression that African-American officers were not viewed as intelligent, and the perception that black officers were not given as many opportunities to make decisions as white officers. (Defs.' J.A., Vol. II, Dep. Ex. 54 at 12, 13.) More importantly, the court must consider the nature of the inquiry in its analysis of this factor. In February 1996, when he was interviewed at Chief **Hansen's** direction, Reaves had not filed any complaints about discrimination, and Reaves had not asked for a forum in which to air personal problems with his employment. Rather, the Chief required Reaves, along with all of the other African-American officers, to submit to an interview and investigatory process based on their race. Again the court notes the principle that "speech on matters of public concern is protected even though it occurs in a private setting." *Maciariello, 973 F.2d at 299.*

The court must assess Reaves' interest in speaking on the matter and balance that interest against the government's interest in providing effective and efficient services to the public. Whatever the government's interests might have **[*120]** been in this case, however, the government cannot genuinely claim that Reaves' speech compromised those interests when **Hansen** effectively forced Reaves to speak.

Reaves has shown that he was adversely affected by the alleged retaliation action in a manner that tended to chill his *First Amendment* rights. He has shown that the decision to subject him and his comments to investigative scrutiny, the attempted termination and ultimate suspension, the placement on administrative duty and the requirement that he shovel rocks and his discharge, under the particular circumstances of this case, would deter him from again exercising his rights to comment on the discriminatory and retaliatory practices of the Department.

Evidence in the record also creates a genuine issue of material fact as to whether Reaves' statements about discrimination and retaliation in the Department played a substantial role in Chief **Hansen's** decisions to take the foregoing actions against him. Although the City has shown that Reaves was on probation in February 1996 when Chief **Hansen** initiated the discrimination investigation, the City has not shown, by a preponderance of the evidence, that the Department would have **[*121]** suspended or ultimately fired Reaves in the absence of his protected expression. *Wagner, 13 F.3d at 90.* More simply, the City has not shown that Reaves' protected speech was not the but for cause of the termination. As with Williams, **Hansen** imposed Reaves' suspension after concluding that Reaves had "lied" in conveying his impression of discrimination in the Department. It would therefore be difficult to show that the Department would have imposed the suspension even if Reaves had not engaged in the protected expression. Although defendants argue that Reaves was ultimately fired as a result of complaints submitted by Hearing Officer

Susan Cole and Sheila Gillard, and Reaves untruthfulness with respect to those incidents, the circumstances in which the complaints regarding the Cole and Gillard incidents were obtained by the Department and the timing of those complaints gives rise to the inference that the Department actively pursued an avenue that would lead to Reaves' discipline or termination. In February 1996, Reaves was subjected to investigation merely because he was black, and Reaves' speech regarding alleged discriminatory practices within the Department, which **[*122]** was compelled by Chief **Hansen** and Lt. Bryant, inevitably motivated the prolonged investigatory scrutiny and subsequent retaliatory harassment Reaves endured.

As with Williams, for purposes of this discussion, the court is considering only the City's liability under *§ 1983*. The City must have had actual or constructive knowledge of Chief **Hansen's** conduct and must have chosen not to take action to stop it or remained deliberately indifferent to it. Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these. Sufficient evidence in the record creates a genuine issue of material fact as to the City's knowledge of Chief **Hansen's** investigatory practices to survive summary judgment on Reaves' claim. Accordingly, the court will deny the City's motion for summary judgment as it pertains to Reaves' *§ 1983* claims based upon the City's alleged violations of his *First Amendment* rights.

IV. *Section 1983* Claims Against Individuals in Their Individual Capacities

While plaintiffs' Title VII claims are cognizable only against **[*123]** the City, plaintiffs' *§ 1983* claims are alleged against both the City and various individual City employees in their individual and official capacities. The claims against the officers in their official capacities are, in essence, claims against the entity for which the officers were acting, see *Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)*, which claims have been analyzed above. The claims against the officers in their individual capacities, on the other hand, seek damage awards against the officers personally. In response to these claims, the officers have raised the defense of qualified immunity.

Qualified immunity protects government officials from civil damages in a *§ 1983* action "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Edwards v. Goldsboro, 178 F.3d 231, 250 (4th Cir. 1999)*(citing *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)*). The Supreme Court has emphasized that

> "[a] court evaluating a claim of qualified immunity 'must *first* determine **[*124]** whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged

> violation'" ... This procedure applies even when the non-constitutional issues in the analysis may resolve the immunity issue more easily than the underlying question of constitutional law.

Milstead v. Kibler, 243 F.3d 157, 162 (4th Cir.) (citing *Wilson v. Layne, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999))*, cert. denied, *122 S. Ct. 199 (2001)*. See also *Edwards, 178 F.3d at 250-51* ("In analyzing the applicability of a qualified immunity defense, we must first identify the specific right that the plaintiff asserts was infringed by the challenged conduct at a high level of particularity.").

> For a right to have been clearly established, "the 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." *Swanson v. Powers, 937 F.2d 965, 969 (4th Cir.1991)* (quoting *Anderson, 483 U.S. at 640)*. In determining **[*125]** whether a right was clearly established at the time of the claimed violation, "courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose ...." *Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)*. "If a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense." *Id.* Notably, however,

> the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity. See *id. at 708*. In analyzing the applicability of the qualified immunity defense, we lastly consider whether a reasonable person in the official's position would have known that his conduct would violate that right ...

Edwards, 178 F.3d at 251 (some citations omitted).

A. § *1983* Claims Against Defendants Sherry Sparks, Katherine Guilette, Steve McIntosh and Captain Bradley Chandler

As a preliminary matter, the court finds that summary judgment should be awarded to defendants with respect to all § *1983* claims **[*126]** against Sherry Sparks, Katherine Guilette, Steve McIntosh and Captain Bradley Chandler in their individual capacities. The court agrees with defendants that plaintiffs have not set forth any specific acts by any of the foregoing defendants that violated clearly established statutory or constitutional rights of which a reasonable person would have been aware. As noted above, suits against these individuals in their official capacities are essentially suits against the City and, accordingly, the foregoing defendants will be dismissed from this action.

Plaintiffs' § *1983* claims against Chief **Hansen** and Lt. Bryant of OPS and City Managers John Smith, Roger Stancil, and Ron Rabun alleging violations of plaintiffs' rights under the *equal protection clause of the Fourteenth Amendment* and the *First Amendment* present more difficult questions, which the court will address below.

B. *First Amendment* and Qualified Immunity

The court will first analyze whether plaintiffs have alleged a deprivation of their *First Amendment* rights, and then proceed to determine whether those rights were clearly established at the time of the alleged violation. The elements of a claim for retaliation under **[*127]** the *First Amendment* are set forth in detail above in the context of plaintiffs' claims against the City. See *Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 351-52 (4th Cir. 2000)*, cert. denied, *531 U.S. 1126, 148 L. Ed. 2d 790, 121 S. Ct. 882 (2001)* and *531 U.S. 1152 (2001)*. As explained above, plaintiffs have set forth *First Amendment* claims against the City that will survive summary judgment based largely on the conduct of Chief **Hansen,** Lt. Bryant and the City Managers charged with supervising **Hansen.** Accordingly, plaintiffs have adequately alleged an actual deprivation of their rights under the *First Amendment* by the foregoing individual defendants, and the court may go on to determine whether those rights were clearly established at the time of the alleged violations. n34

> n34 Some of the individual defendants have argued that they did not personally participate in the alleged deprivations of plaintiffs' constitutional rights and thus cannot be subject to liability under § *1983* for those deprivations. While this argument, if successful, could provide an alternative basis for the court's decision to allow summary judgment with respect to the § *1983* claims based on the *First Amendment* violations against the City Managers, the issue is adequately resolved by the court's qualified immunity analysis and the court will therefore not address the alternative argument.

[*128]

Plaintiffs argue, of course, that their right to articulate opposition to discrimination within the Department was clearly established at the time the events in the case occurred. With respect to the defining of a right at issue the Fourth Circuit has explained that

> The right allegedly violated must be articulated in a "particularized" and "relevant" way. *Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034* ... (1987). A plaintiff may not merely assert the violation of some "overarching entitlement" to a named right ... Instead, he must be sufficiently specific to allow us to decide whether "a reasonable official would understand that what he

> [did] violates that right." ... But "it is important not to be overspecific -- there need not be a prior case directly on all fours with the facts presented to the official." ... Still, we must be able to conclude that, in light of pre-existing law, the unlawfulness of the challenged action was apparent to the official.

Cromer, 88 F.3d at 1325 (some citations omitted)(holding that, in 1991, it was clearly established that a letter, drafted by an association of black officers, **[*129]** expressing the group perception that widespread, specific, and serious incidents of discrimination were jeopardizing the effectiveness of the Sheriff's office as a law enforcement agency, which Cromer adopted as his own speech, was constitutionally protected speech).

To hold the individual defendants named here liable under § *1983*, the right to speak about a public concern such as discrimination within a police department must have been clearly established in 1996. As explained in Edwards, "for a right to have been clearly established, 'the "contours of the right" must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional.'" *178 F.3d at 251*. In May 1996, Chief **Hansen** and Lt. Bryant did not have the benefit of the Cromer decision, which was issued in July 1996. Although the Cromer court held that Cromer's right to speak about racism in the sheriff's office was clearly established as of 1991, the nature and context of the speech in Cromer were different than the nature and context of Williams'

speech. The Cromer court emphasized the following facts: the widely-held nature of the views about racial discrimination **[*130]** in the sheriff's office as illustrated by the fact that the letter at issue was sent by a group of almost 32 officers; that the speech at issue had the potential for a broad impact because public safety was put at risk by the group perception that black officers were discriminated against; that by calling into question the effectiveness of the office, plaintiff's interest merged with the community's interests; and that the letter enumerated many specific examples of discriminatory practices within the office. As the Cromer court emphasized,

> only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply and not yet well-defined.

88 F.3d at 1326. The Cromer court went on to point out that its holding was a narrow one and to state that it "is the infrequent ... claim that will survive a qualified immunity defense." *Id. at 1330, n.11.*

While the court concluded above, in its analysis of plaintiffs' *§ 1983* claims against the City based upon violations of **[*131]** their *First Amendment* rights, that the balancing test tipped in favor of plaintiffs in this case, it did not do so "decidedly" as in *Cromer*, and, moreover, the court cannot conclude that a reasonable official would necessarily have realized that he would

violate the Constitution if he subjected an officer's complaints about racism to the type of investigative protocol employed here.

Accordingly, the court will award summary judgment to defendants **Hansen,** Bryant, Smith, Stancil, and Rabun on plaintiffs' claims asserting violations of their *First Amendment* rights under *§ 1983* based on the defense of qualified immunity.

C. Equal Protection and Qualified Immunity

Plaintiffs have alleged that Chief **Hansen** violated their rights to equal protection by interviewing only the black officers in the Department in February 1996. n35 Defendants do not dispute the fact that only the black officers were interviewed, nor do they dispute the fact that Shambley and Moyd were selected to perform the initial interviews because they were black.

> The *Equal Protection Clause* provides that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws. **[*132]** " *U.S. Const., Amdt. 14, 1.* Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. *Washington v. Davis, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040* ... (1976). Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition ... Express

racial classifications are immediately suspect because, "absent searching judicial inquiry ..., there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." ... see also [*United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 172, 51 L. Ed. 2d 229, 97 S. Ct. 996* ... (1977)(UJO)] (Brennan, J., concurring in part) ("[A] purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries"). Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. **[*133]** " ... They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility ... *UJO, supra, 430 U.S., at 173*, ... (Brennan, J., concurring in part) ("Even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs"). Accordingly, we have held that the

> *Fourteenth Amendment* requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.

Shaw v. Reno, 509 U.S. 630, 642, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993). See also *Beardsley, 30 F.3d at 529* (citing *Davis v. Passman, 442 U.S. 228, 234-35, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979)*). Courts have applied this principle to conclude that intentional racial harassment of a public employee by a supervisor constitutes race discrimination in violation of the *Equal Protection Clause of the Fourteenth Amendment* **[*134]** and is also actionable under § *1983*. See *id.*

> n35 Plaintiffs also claim that Chief **Hansen** violated their equal protection rights by further targeting those African-American officers who identified discriminatory practices within the Department. This latter claim does not state a cognizable equal protection claim.

As plaintiffs suggest, the evidence indicates that Chief **Hansen** undertook a formal investigation of racial discrimination within the Police Department and, in electing to interview only the black officers in the Department, effectuated a racial classification that immediately and ultimately subjected plaintiffs to unequal treatment. While a statutory classification is not at issue here, the Fourth Circuit has recognized that "the *Equal Protection Clause* limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or

enforcement of its laws and regulations." *Sylvia Development Co. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995).* **[*135]**

Because Chief **Hansen's** investigation was explicitly limited to black officers, a suspect class, the court must apply strict scrutiny. Defendant **Hansen** must show that the investigation was narrowly tailored to serve a compelling state interest. See *Shaw v. Hunt, 517 U.S. 899, 908, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996)*(placing burden of proving compelling interest and narrow tailoring on entity responsible for suspect classification).

Even assuming that the Department's stated purpose for interviewing and investigating only the black officers was its actual purpose n36 and that the stated purpose was compelling, the court cannot conclude that the means chosen to effectuate the stated purpose were narrowly tailored. It was clearly overinclusive in that it subjected to investigation black officers who did not feel that discrimination or retaliation existed in the Department and underinclusive in that it did not take into account the perceptions of white officers regarding racial discrimination in the Department. There were certainly other, more narrowly tailored, non race-based methods that the Department could have employed to accomplish its stated purpose.

n36 See *Shaw v. Hunt, 517 U.S. 899, 908, n.4, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996)*(citing *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730, 73 L. Ed. 2d 1090, 102 S. Ct. 3331*, and n.

16, *458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331, 3339*, and n. 16, *458 U.S. 718, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982)* for proposition that "to be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose" for the discriminatory classification").

[*136]

The court also concludes that plaintiffs' right to equal protection of the laws protecting them from being subjected to coercive state conduct solely on the basis of their race was clearly established in February 1996. See *Washington v. Davis, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976)*("The central purpose of the *Equal Protection Clause of the Fourteenth Amendment* is the prevention of official conduct discriminating on the basis of race.") The court also concludes that a reasonable person in Chief **Hansen's** position would have known that his conduct would violate that right. Accordingly, the court concludes that defendant Ronald **Hansen** is not entitled to qualified immunity and thus is not entitled to summary judgment on plaintiffs' *§ 1983* claims that his conduct violated their right to the equal protection of the laws.

V. Direct Constitutional Claims

Plaintiffs' amended complaints could be construed to assert claims directly under the *First Amendment*. Although the Fourth Circuit has not addressed the issue, its treatment of actions brought directly under the *Fourteenth Amendment* and other courts' treatment of claims asserted directly under

[*137] the *First Amendment* persuade this court that a direct action under the *First Amendment* is not cognizable where a plaintiff may assert the cause of action under *§ 1983*. See *Morris v. Washington Metropolitan Area Transit Authority, 226 U.S. App. D.C. 300, 702 F.2d 1037, 1042 (D.C. Cir. 1983)*(explaining that a "direct constitutional remedy for the unlawful conduct of state actors, if any such remedy exists, would necessarily depend upon the *Fourteenth Amendment*, incorporating the substantive guarantees of the First, as its source" and noting, in any event, that "the statutory remedy granted by *42 U.S.C. § 1983* does afford relief for the infringement of *First Amendment* rights alleged"); *id. at 1042, n.10* (collecting cases in which courts declined to imply a direct constitutional remedy in the face of the statutory remedy available against nonfederal defendants in the wake of *Monell); Cale v. City of Covington, Va., 586 F.2d 311, 313 (4th Cir. 1978)*(holding that implied cause of action for damages against a municipality for the act of its employee under the *Fourteenth Amendment* does not exist without the limitations imposed **[*138]** by *§ 1983*); *Malley v. Fernandez, 1992 U.S. Dist. LEXIS 11993, 1992 WL 204359, *3 (S.D.N.Y. Aug. 10, 1992)* (where *§ 1983* unquestionably provides an effective and adequate remedy for *First Amendment* violations by persons acting under color of state law, a direct claim under the Constitution is precluded).

VI. State Law Emotional Distress Claims

Under North Carolina law, a plaintiff seeking to establish intentional infliction of emotional distress must show that the defendant engaged in extreme and

outrageous conduct which is intended to and does cause severe emotional distress. See *Waddle v. Sparks, 331 N.C. 73, 414 S.E.2d 22, 27 (1992); Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).* The emotional distress suffered by plaintiff must be of a very serious kind. The Supreme Court of North Carolina has described severe emotional distress as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle, 414 S.E.2d at 27.* Plaintiffs' **[*139]** forecast of evidence, taken in the light most favorable to them, fails to show that they have suffered the requisite degree of emotional distress necessary to maintain their cause of action. Defendants' motion for summary judgment will be allowed as to plaintiffs' claim for intentional infliction of emotional distress.

VII. Conclusion

Defendants' motions are ALLOWED to the extent they seek summary judgment on the following claims: all *§ 1983* claims pertaining to defendants Sherry Sparks, Katherine Guilette, Steve McIntosh and Bradley Chandler in their individual capacities; all *§ 1983* claims against all defendants based on alleged violations of substantive due process; all *§ 1983* claims against all defendants alleging retaliation in violation of the *equal protection clause*; all *§ 1983* claims based on the *First Amendment* alleged against **Hansen,** Bryant, Smith, Rabun, and Stancil in their individual capacities; all *§ 1983* claims based on a violation of the *equal*

protection clause alleged against the City or against Bryant, Smith, Rabun, or Stancil in their individual and official capacities; any claims asserted directly under the *First Amendment*; and all claims asserting **[*140]** intentional infliction of emotional distress under state law. All of the foregoing claims are DISMISSED, and defendants Sherry Sparks, Katherine Guilette, Steve McIntosh, Bradley Chandler, Richard Bryant, John Smith, Ron Rabun, and Roger Stancil are DISMISSED from this action.

Defendants' motions for summary judgment are DENIED with respect to the following claims: plaintiffs' retaliation, retaliatory discharge, and retaliatory harassment claims against the City under Title VII; plaintiffs' *§ 1983* claims against the City based on the *First Amendment*; and plaintiffs' *§ 1983* claims against Chief **Hansen** based on the *Equal Protection Clause*.

Because none of the parties has filed a motion to sever this action as permitted by the 3 February 2000 Order of Consolidation, these cases REMAIN CONSOLIDATED for trial. Trial in this matter is scheduled for 3 June 2002 in Raleigh, North Carolina.

This 9 May 2002.

W. Earl Britt
Senior United States District Judge

FILE COPY
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED June 13, 2003
[ENTERED June 13, 2003]

No. 02-1573
CA-99-450-5
CA-99-449-2-5BR

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES

Plaintiffs - Appellees

v.

RONALD E. HANSEN, individually and in his official capacity as Police Chief

Defendant - Appellant

and

THE CITY OF FAYETTEVILLE; ROGER STANCIL, individually and in his official capacity as City Manager; JOHN SMITH, individually and in his then official capacity as City Manager; RON ROBUN, individually and in his official capacity as City Manager; BRADLEY CHANDLER, individually and in his official capacity as a City Police Officer; RICHARD BRYANT, individually and in his official capacity as a City Police Officer; KATHERINE GUILETTE,

individually and in her official capacity as a City Police Officer; STEVE MCINTOSH, individually and in his official capacity as a City Police Officer; THE FAYETTEVILLE CITY COUNCIL; SHERRY SPARKS, individually and in her official capacity as a City Police Officer

Defendants

THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INCORPORATED; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Fayetteville, North Carolina Branch

Amicus Supporting Appellee

On Petition for Rehearing and Rehearing In Banc

Appellees have filed a petition for rehearing en banc. Amicus Curiae National Association of Police Organizations has filed a motion for leave to file a memorandum in support of the petition for rehearing en banc.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing en banc and the motion of Amicus Curiae.

Entered at the direction of Judge King for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

bcc: Honorable Robert B. King
Circuit Judge

Honorable Clyde H. Hamilton
Senior Circuit Judge

Honorable Morton I. Greenberg
Senior Circuit Judge

NOV 10 2003

No. 03-381

IN THE

Supreme Court of the United States

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES

Petitioners,

v.

RONALD HANSEN, individually and in his official capacity as Police Chief,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Cited Authorities ii

Reasons for Denying the Petition 1

The Fourth Circuit's Decision Below Does Not Conflict With Equal Protection Decisions Of Any Other U.S. Court Of Appeals Or The Supreme Court. 3

Conclusion 7

TABLE OF CITED AUTHORITIES

Page

Cases

Arlington Heights v. Metro Housing Dev. Corp.,
429 U.S. 252, 50 L. Ed. 2d 450 97 S. Ct. 554
(1977) 3, 4

Behrens v. Pelletier,
516 U.S. 299, 133 L. Ed. 2d 773 116 S. Ct. 834
(1996)..... 3

Harlow v. Fitzgerald,
457 U.S. 800, 102 S. Ct. 2727 (1982) 4, 5

Johnson v. Jones,
132 L. Ed. 2d 238 115 S. Ct. 2151 (1995) 3

REASONS FOR DENYING THE PETITION

Petitioners in their questions presented have rephrased into three parts the actual central issue which was presented to the Fourth Circuit below, which is:

> whether when there are allegations that a discreet racial group has been subjected to discrimination, it is lawful to conduct interviews in the first instance only of members of that group to ascertain their experiences and perceptions with respect to the discrimination. (Appendix pp. 10-11)

Respondents take exception to Petitioners' attempts to recreate facts and assert knowledge to Defendant Ronald Hansen for which there was no record evidence below. In the underlying case, the Plaintiffs chose not to depose Defendant Ronald Hansen, and the only testimony regarding his basis for having ranking black officers interview other black officers on the force was Chief Hansen's testimony in one of the Plaintiffs' grievance hearings below:

> The issue of racial discrimination, racism has surfaced two or three times prior to these incidents, and I needed to know if, in fact, there was any discrimination or racism on our department. So, at that point, I determined that I wanted to have an inquiry to find out if, in fact, there was and if there was, of course, I needed to deal with it. (J.A. p. 92)

The Petitioners go to great lengths to preface every argument by implying that the Chief's motive for violation

of equal protection was a "witch hunt" for members of "Officers For Equality." Ironically, the Record below established that Plaintiff Reaves was not even a member of Officers For Equality.

Despite Petitioners' emphasis on Chief Hansen's "motives," his motivation played no role in the analysis of the legal issue before the Court, and Respondent submits that the Petitioners are simply attempting to pull Chief Hansen into the retaliatory termination claim which they are presently pursing against the City of Fayetteville in the trial court. Both the District Court and Fourth Circuit Court below agreed that the Plaintiffs' "claim that Chief Hansen violated the Equal Protection Rights by further targeting those African American officers who identified discriminatory practices within the department . . . does not state a cognizable equal protection claim." (A. p. 11, citing slip opinion).

Petitioners have failed to set forth a basis for granting a writ, as they have failed to articulate any real conflict between the Fourth Circuit's decision below, and any decision of another United States Court of Appeals or the Supreme Court. Their argument also fails to establish an important question that runs contrary to established constitutional logic.

THE FOURTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH EQUAL PROTECTION DECISIONS OF ANY OTHER U.S. COURT OF APPEALS OR THE SUPREME COURT.

Petitioners have contended that the Fourth Circuit's decision conflicts with the Supreme Court's decision in *Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 554 (1977), regarding equal protection, and that the lower court's decision further conflicts with the decisions of *Behrens v. Pelletier*, 516 U.S. 299, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996), and *Johnson v. Jones*, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995), which preclude an appellate court's resolution of disputed facts. The Petitioners, however, have failed to analogize any facts contained in *Arlington Heights*, or any other Court of Appeals or Supreme Court decision, which illustrate a factual/legal conflict with the Court's decision below. In fact, the Fourth Circuit in applying *Behrens v. Pelletier*, explained why the issue presented to the Court, was proper for summary judgment consideration, aside from arguments of the Police Chief's motive:

> The existence of a factual dispute regarding Hansen's motives does not preclude us from entertaining this appeal even though we cannot resolve disputes of fact. What we can and will do is answer the abstract question of law as to whether when there are allegations that a discrete racial group has been subjected to discrimination, it is lawful to conduct interviews in the first instance only of members of that group to ascertain their experiences and perceptions with respect to discrimination. See *Behrens v. Pelletier*, 516 U.S. 299, 312-313 (1966) (A. pp. 10, 11)

Petitioners characterized the decision below as a "landmark departure" from the evidentiary standards of proof that a plaintiff would be required to show to prove existence of discrimination under the equal protection clause as provided under *Arlington Heights v. Metro Housing Dev. Corp*, which position again ignores the fact that the Fourth Circuit was presented with a clear legal question that did not rely upon facts regarding motivation. The Fourth Circuit succinctly followed the equal protection analysis established by the Supreme Court to determine (1), whether the Plaintiffs have set forth a claim indicating that they have been deprived a constitutional right, and (2), whether the right which the Defendant allegedly violated was "clearly established at the time of its alleged violation so that a reasonable person would have known of the right." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982), (A. pp. 9-10)

The Fourth Circuit held that the first prong of the test was not met in that relative to the question of whether blacks were discriminated against, whites and blacks were not "similarly situated." (A. p. 13) The decision pointed out that the Plaintiffs could not show disparate treatment between black and white officers, as the inquiry was a response to allegations of discrimination only against black officers. (A. p. 14)

The Court then addressed the second prong of the equal protection analysis, which is whether the constitutional right in question was "clearly established" at the time alleged so that "a reasonable person would have known of the right." The Fourth Circuit, in finding that the Plaintiffs have failed to establish that Chief Hansen had violated the "objective legal reasonableness" standard of *Harlow v. Fitzgerald*,

457 U.S. 800, 102 S. Ct. 2727 (1982), pointed out what Respondent submits is an obvious truth:

> Certainly if judges of United States Courts of Appeals are of the view that plaintiffs are advancing a "right" that did not exist when allegedly infringed (and still does not exist), then the right could not have been clearly established at the time infringed. Indeed, it would be remarkable to hold that a reasonable person, here a Chief of Police, should have known more constitutional law than United States Circuit Judges and that because he did not, he should be subject to the imposition of monetary damages. (A. p. 20)

The Fourth Circuit also noted in its decision that Defendant Hansen in his appellate Brief had thrown down the "gauntlet" to the Plaintiffs in stating in his opening Brief that he had been unable to locate "any appellate cases similar to the trial court's basis for denying him qualified immunity . . . , and that the absence of any such cases was "an indicator that his proactive decision to interview black officers can certainly not be said to have violated 'clearly established law' as of February 1996." (A. p. 23)

The Court below also alternatively discussed the fact that even if the Plaintiffs' claim had not failed the initial prong, that Chief Hansen's decision to have ranking black officers interview black officers concerning perceived discrimination on the force would have survived "strict scrutiny" analysis. The Circuit Court pointed out that although the District Court in its slip opinion and the Petitioners have contended that there were narrow and more tailored methods to determine

if there were actual indications of discrimination on the force, that they have failed to suggest or give any examples of a method more narrowly tailored than that chosen by Chief Hansen. (A. pp. 15-20) What makes the Petitioners contention invalid on its face, is that to accept their equal protection analysis in our context would mean that an administrator, who was presented with complaints that female employees were being sexually harassed, would be unable to initially assign a female administrator to speak with the female employees to determine if the problem was widespread, or isolated. In fact, an administrator's failure to so address a claim of this nature may in and of itself subject him to liability. Respondent further submits that this decision also runs contrary to the normal investigative process which is to first talk with the individuals who are said to be the "victims" of wrongdoing, to first determine the specifics, and the scope of any offense.

Had there been recurring complaints of discrimination against Latinos, or anti-Semitic statements or treatment of Jewish officers, then Chief Hansen would have likewise had a rational basis for inquiring of these officers if they perceived the problem to be widespread.

CONCLUSION

Respondent submits that the Petition fails on its face to establish any conflict between the Fourth Circuit's immediate decision and any other Court of Appeals or Supreme Court case. The decision written by Judge Greenberg for the majority of the Court, clearly and succinctly addressed the facts at bar under the analysis provided by the Supreme Court.

For the reasons set forth above, Appellant Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(3) No 03-381

Supreme Court, U.S.
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In The
Supreme Court of the United States

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES,

Petitioners,

v.

RONALD HANSEN, individually and in his official capacity as Police Chief,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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10 cc

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES..... ii

ARGUMENT.....1

CONCLUSION 6

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Adarand Constructors, Inc. v. Pena,
515 U.S. 200, 132 L. Ed. 2d 158,
115 S. Ct. 2097 (1995) 4

Arlington Heights v. Metro Housing Dev Corp.,
429 U.S. 252, 50 L. Ed. 2d 450,
97 S. Ct. 554 (1977) 1

Baker v. City of St. Petersburg,
400 F.2d 294 (5th Cir. 1968) 5

Hayes v. North State Law Enforcement
Officers Ass'n,
10 F.3d 207 (4th Cir. 1993) 5

McNamara v. City of Chicago,
138 F.3d 1219 (7th Cir. 1998) 5

Patrolmen's Benevolent Ass'n of N.Y., Inc. v.
City of New York,
310 F.3d 43 (2d Cir. N.Y. 2002), cert. denied,
__ US __, 123 S. Ct. 2076 (2003) 3, 4, 5

Regents of the University of California v. Bakke,
438 U.S. 265, 57 L. Ed. 2d 750,
98 S. Ct. 2733 (1978) 4

Reynolds v. City of Chicago,
296 F.3d 524 (7th Cir. 2002) 4

Washington v. Davis,
426 U.S. 229 (1976).....2

Williams v. Fayetteville,
5:99-CV-449-BR(2) (E.D.N.C. May 13, 2002).....2

Wittmer v. Peters,
87 F.3d 916 (7th Cir. 1996) 5

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267, 90 L. Ed. 2d 260,
106 S. Ct. 1842 (1986).....4

ARGUMENT

Although admitting that race was the sole factor in determining who was subjected to this investigation, both the Fourth Circuit and the Respondent avoided a strict scrutiny analysis by reasoning that only African American police officers had been "subjected to discrimination." (Respondent's Brief, Page 1). The record more accurately outlined Mr. Hansen's motive as an attempt to uncover the names of the African American police officers that he had learned had attended a church meeting to discuss racial problems within the department. The dissent below properly acknowledged that " the dispute of fact as to Hansen's motives in selecting all and only the African-American officers in his department as targets of his investigation cannot so easily be brushed aside"[1] (App. 11, citing slip opinion). In applying the "totality of the relevant facts" inquiry, the dissent below noted that:

> In delving in the minds of state officials, a court may look to "such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metro Housing Dev Corp., 429 U.S. 252, 266 50 L. Ed. 2d 450, 97 S. Ct. 554 (1977). "[A]n invidious discriminatory purpose may

---

[1]The Respondent admitted that Mr. Hansen's "motivation played no role in the analysis of the legal issue before the Court. (Respondent's Brief, pg 2).

> often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 426 U.S. at 242.

Also crucial to this analysis is that not one African American police officer raised any complaints about discrimination and that Mr. Hansen had prior knowledge that these officers did not want to discuss any concerns they had about discrimination with him. Furthermore, the fact that Hansen immediately disclosed to the supervisors the perceptions and comments of these African American officers with a clear invitation to "discredit" their comments as part of the ongoing investigation was highly probative of an illegal motive. And while the record remains devoid of any evidence that even one African American police officer benefited from this investigation, there is no dispute that this investigation ultimately resulted in the termination of both Petitioners solely because they perceived discrimination existed. The dissent below aptly noted:

> As the district court observed, while the purpose of the Hansen's investigation was "ostensibly to discern the existence or prevalence of discriminatory or racist practices or conduct in the Department," "[i]t seems clear from defendants' statement . . . that the Department was not intent on investigating the perceptions of discrimination but rather intent on investigating what the defendants involved considered `lies.'" Williams v. Fayetteville, Mem. Op., 5:99-CV-449-BR(2), at 22 n. 15 (E.D.N.C. May 13, 2002). The "tortuous

> machinations employed to transform descriptions of perceived discriminatory or retaliatory conduct into `lies,'" id., lend further credence to the plaintiffs' contention that Hansen ordered the African-Americans only interviews with discriminatory intent.

This decision by the Fourth Circuit conflicts with Equal Protection jurisprudence that has been consistently mandated that a strict scrutiny analysis be applied whenever a racial classification has been made by a government official. The Fourth Circuit now stands alone as the only circuit that has made such a drastic departure from this clear precedent. In Patrolmen's Benevolent Ass'n of N.Y., Inc. v. City of New York, 310 F.3d 43, 2002 (2d Cir. N.Y. 2002), cert. denied, __ US __ , 123 S. Ct. 2076 (2003), a number of African American police officers asserted that their constitutional rights were violated when they were laterally reassigned to a heavily minority precinct following an incident where a black citizen was assaulted by white officers. Just as in this case, the transfers were admittedly race-based, but the city argued they were necessary to prevent the situation from getting out of control.

In following the longstanding Equal Protection precedence established by this Court, the Second Circuit described the City of New York's effort to rationalize the racial classification as a "particularly steep uphill climb" and that:

> It is well-established that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Regents of the University of California v. Bakke, 438 U.S. 265, 291, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Justice Powell). Accordingly, all racial classifications imposed by a government actor "must be analyzed by a reviewing court under strict scrutiny." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). To survive that strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest. Id. See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986).
>
> Patrolmen's, 310 F. 3d at 53.

Through a careful analysis, the Second Circuit then rejected the City's contentions that such a racial classification was an appropriate response to a state interest[2]. The Second Circuit noted that:

> The mere assertion of an "operational need" to make race-conscious employment decisions does not, however, give a police department carte blanche to dole out work assignments based on race if no such

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2"Argument in so sensitive an area of human relations must not.. . be allowed to draw on 'common sense,' which might be inflected by stereotypes." Reynolds v. City of Chicago, 296 F.3d 524, 526 (7th Cir. 2002)

> justification is established. The assignment of police officers to certain neighborhoods or tasks because of their race has been rightly held to run afoul of the Fourteenth Amendment. See.e.g., Baker v. City of St. Petersburg, 400 F.2d 294, 300 (5th Cir. 1968). Mindful of the potential for abuse in an "operational need" defense to race-based employment actions, courts recognizing the defense have required the government actor to demonstrate that it is "*motivated by a truly powerful and worthy concern and that the racial measure. . . adopted is a plainly apt response to that concern.*" Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996). The justification must be substantiated by objective evidence – mere speculation or conjecture is insufficient. Id at see also McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998); Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213-14 (4th Cir. 1993). (emphasis added)
>
> Patrolmen's, 310 F. 3d at Pg 52-53

The Patrolmen's case is closely analogous to this case as the New York Police Department made the exact same type of racial classification that Mr. Hansen did by distinguishing officers solely on the basis of their race. Unlike the Second Circuit, however, the Fourth Circuit chose not to follow the long standing legal precedence. The Respondent instead has attempted to distract the Court from this radical departure by misrepresenting Mr. Hansen's motivation as simply wanting to make an inquiry about racial discrimination.

However, the undisputed facts in this case were more than adequate to support an inference that Hansen's facially neutral policy of directing his investigation at the purported victims of racial discrimination within the Department was motivated by invidious discriminatory animus. The Fourth Circuit erred when it failed to apply strict scrutiny to the racial classification by the Fayetteville City Police Department and qualified immunity should not have been granted.

CONCLUSION

For the foregoing reasons, Virgil H. Reaves and Gregory A. Williams respectfully request the Court to grant their petition for certiorari.

Respectfully submitted this the 24th day of November 2003.

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